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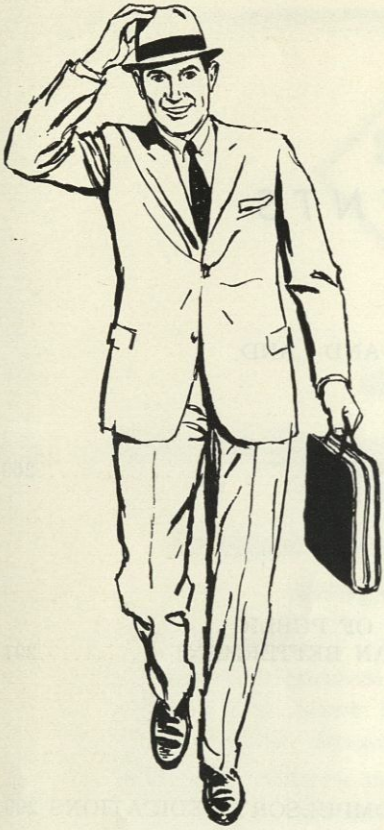

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THE SOCIAL PARADOX OF ZONING AND LAND CONTROLS IN AN EXPANDING URBAN ECONOMY

By GEORGE L. CREAMER*

The essential condition of modern life is the city; its heartbeat, the machine; its ultimate characteristic, the population, a vast and interacting reservoir of labor and absorber of product. The population movement toward Megalopolis is tidal. The desiderate of contemporary life cluster there; the once vital function of rural America is readily performable by constantly smaller population segments; and the economic function of the market town, archetype of American living only forty years ago, is disappearing. A basic trend since mid-eighteenth century, such is the thrust and developmental speed of this movement that the United States consists, in posse, and in twenty years will be in esse, thirty megapolitan centers, each vastly emanating from a core city, aggregately encompassing some 90% of the nation's people.

Presupposing such development, obviously the most valued asset in such a civilization is megalopolitan land. Economic power is largely involved in control, use, and dominance of that land. Human comfort and well-being are intimately dependent upon the uses made of that land. Of necessity, most human aspirations and interests in some manner center upon it, and the control and use of that asset or commodity becomes focal, the center on which bear the most vital of economico-political forces.

Mr. Justice Brewer once remarked: "The city is a miniature state, the council is its legislature, the charter is its constitution."[1] Justice Lurton referred to the city as "presumptively the more populous and better organized community."[2] As megalopolitan life develops, each miniature state strives for preeminence with the state itself, with zoning the modal base and field of contest.

"Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."[3] Thus, even the most conservative of lawyers and jurists have recognized, putting the thesis beyond the area of fruitful argument, the basic necessity for some land use control. "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and continually are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."[4] Indeed, "regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half

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1 Paulsen v. Portland, 149 U.S. 30, 38 (1893).
2 Chicago v. Surges, 222 U.S. 313, 324 (1911).
3 Hesse v. Rath, 249 N.Y. 436, 438 (1928).
4 Euclid v. Ambler Realty Co., 272 U.S. 365, 386-7 (1926).

a century ago, probably would have been rejected as arbitrary and oppressive."[5]

Only against a background of this kind of general acceptance of necessity for some land and use controls can we present zoning problems as they have developed and are present among us. This article has little utility as a technical legal exposition and is not proposed as a manual of zoning practice or procedure; technical matters are covered multipally by texts more complex than useful, and a plethora of not necessarily reconcilable cases increases daily at all judicial levels. Rather, it is hoped here to demonstrate the multiple purposiveness of zoning, its complexity as a theater of interaction of vital and diverse interests tending in common with many of our institutions toward the schizophrenic; an area sundered by forces divergently moving and like that fabled messenger, mounting, to ride rapidly off in all directions.

DICTA usefully allows presentation of these problems because it is a Colorado publication and because Denver is a megalopolis in its essentials,—a juvenile megalopolis with those essentials sufficiently at the surface to present symptoms for ready analysis. Megalopolitan growth is a phenomenon of such recency here as to present a most valuable clinical exhibit.

Zoning as a concept finds its sole justification in the exercise of the police power, allowable only as it tends to promote public health, safety, and welfare. As restrictions upon the use of private property, zoning regulations must be strictly construed. Use of property for lawful purposes in the discretion of its owner is a primary constitutional right; restriction is permissible but inhibited, and allowable only as dictated by the public interest under proper procedural safeguards. Restriction is not permissible for private or individual ends, nor in the interest of competing property values. Neither is restriction allowable on grounds of political utility or for political convenience.

From these few premises, with which most will probably agree, germinates and grows the schizophrenic seed. Zoning at base is "policy." "New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. . . . Time may be necessary to fashion them to precedent customs and conditions."[6] Advance and pace usually, however, are neither undirectional nor unswerving. If there be uniformity at all, it is the uniformity of a spiral, reversing as it ascends or advances, a tendency causing the appearance, when viewed from a static point of vantage, of movement in directions quite opposite from the utlimate end. Policy is politics, in essence, a variable quantity; "The alternations of our national mood are such that a cycle of liberal government seldom exceeds eight years."[7] Nor does any other angulation of the spiral continue without reverse much longer.

Recent Colorado zoning history demonstrates an apparent contradiction in direction and conflict in purpose, characteristics often besetting the path of precedent-based law. Forty years of zoning in this state, however, rather clearly indicate the basic direction

5 *Id.* at 387.
6 Bunting v. Oregon, 243 U.S. 426, 438 (1917).
7 Jackson, *The Struggle for Judicial Supremacy* 187 (1941).

in which the spiral must proceed, as well as demonstrating the barriers, interferences, and obstructions latent in that course.

Theoretically, the basis of zoning laws upon the police power alerts the public immediately to the dangers implicit within the concept. "The police power . . . is the most absolute of the sovereign powers of the state . . . . It 'extends to so dealing with the conditions which exist in a state as to bring out of them the greatest welfare of its people.' "[8] "In a sense, the police power is but another name for the power of government."[9] According to Holmes, "police power" is used in a broad sense "to cover . . . and . . . to apologize for the general power of the legislature to make a part of the community uncomfortable by a change."[10]

Zoning basically is the instrumentality by which the base power of the state, through the mechanism of the city, is focused upon the use of private property, the Arcanum under traditional Anglo-American legal concepts. "The legal conception of property is of rights;"[11] a conception of use and enjoyment; "whatever a person can possess and enjoy by right."[12] Thus, "all that is beneficial in property arises from its use, and fruits of that use."[13] So conceived, zoning involves a fearful kind of power which must always be held in balance.

"Property like every other social institution has a social function to fulfill;"[14] few will gainsay the hypothesis that "the property rights to the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare of the security of the many."[15]

In the working out of regulation, its direction and modality, calculation of the forces which actuate it cause the difficulty, the paradox of zoning in an expanding economy. Succinctly stated by McKenna: "Depart from the simple requirements of law, that everyone must use his property so as not to injure others, and you pass to refinements and confusing considerations."[16]

Constitutional literature is largely devoted to a search for a basis for protection of property, or a justification for its limitation. That quest epitomizes zoning. Story postulated that "it must always be a question of the highest moment, how the property-holding part of the community may be sustained against the inroads of poverty and vice."[17] That thesis is basic to constitutional law viewed as a system of "constitutional limitations" since the Constitution in large measure is essentially a restriction upon the rapacity of majorities which, absent such legal barriers, could subject all things to their desires by force of number alone. In our society, under the Constitution, differential notions of utility may not be a basis to deprive one of his property: "One does not lose what is one's own

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8 Louisville & N.R.R. v. Central Stock Yard Co., 212 U.S. 132, 150 (1909).
9 Mutual Loan Co. v. Martell, 222 U.S. 225, 233 (1911).
10 Tyson v. Banton, 273 U.S. 418, 446 (1927).
11 LeRoy Fiber Co. v. Chicago, M. & St. Paul Ry., 232 U.S. 340, 350 (1914).
12 Central Pac. R.R. v. Gallatin, 9 Otto (99 U.S.) 700, 738 (1878).
13 Munn v. Illinois, 4 Otto (94 U.S.) 113, 141 (1876).
14 Cardozo, *The Nature of the Judicial Process*, in Selected Writings of Benjamin Nathan Cardozo 141 (Hall ed. 1947).
15 Cardozo, *Paradoxes of Legal Science*, in Selected Writings of Benjamin Nathan Cardozo 254 (Hall ed. 1947).
16 LeRoy Fiber Co. v. Chicago M. & St. Paul Ry., *supra* note 11 at 350.
17 Story, *Miscellaneous Writings* 514 (1835).

because its utility would be greater if it were awarded to someone else."[18]

Neither, however, is the property owner wholly free to ignore basic concepts of utility: "The realization of the benefits of property must always depend in large degree on the ability and sagacity of those who employ it."[19] To maximize the value of property, its private owner must be able to "divine in advance the equilibrium of social desires."[20]

Zoning of Megalopolis treats of the most restricted of commodities, land, possessed of a unique place and valued because of its unique location in one of the 30-odd foci of American civilization. Terrible paradoxes result.

Substantial segments of the community seek to restrict the use of land controlled by other substantial segments who desire to make use of their properties in a lawful and beneficial manner. These purposes may, however, make less comfortable living conditions for others when practiced in a comparatively restricted space. Such desired restrictions involve one of the most legitimate ends of zoning, but severe abuses and extreme emotional pressures are inherent in them.

Competing users of land, for like and similar purposes, seek to impose restrictions upon their competitors through zoning laws legal in form, but tending to the personal benefit and aggrandizement of the movant competitors only. This illustrates an entirely illegitimate subversion of zoning ends and a practice universally present in all theaters of zoning operations.

Further, a tendency develops to aggregate in the hands of the more legislatively favored segment of megalopolitan society the most esteemed and valued land assets of the society, creating by virtue of legislative restriction of use a monopoly of a priceless commodity in the hands of that favored group. This is one of the most insidious of zoning practices, a perpetually crescent threat implicit in zoning as it is now practiced.

Finally, there tends to develop, quite apart from the basic concept of "police power" and legitimate protective ends, a substitution of public officials' notions of land utility value for like notions of private owners. That is to say, there is a crescent tendency to attempt centralization, through zoning, of control of the economic

18 Golde Clothes Shop, Inc. v. Loena's Buffalo Theaters, Inc., 236 N.Y. 465, 470 (1923).
19 Simpson v. Shepard, 230 U.S. 352, 458 (1913).
20 Holmes, Speeches 100 (1934).

activity of the state, represented by the use values of land in Megalopolis, in the hands of a bureaucratic minority which is by no means necessarily capable of wielding that power. Such bureaucratic subjugation at best tends to strangle and distort economic development in an expanding economy; at worst, it threatens extinction of that economy in the form in which we know it. This is the most insidious danger in zoning.

Rights of property are inseparable from rights of personalty, the basis of our constitutional structure. Property merely represents the dominance of individual man over his physical environment. Maximization of Man, as exemplified in the completed individual, must remain the basic end of a free society. Agglomerative principle, destructive of individual man, must begin his ruin by destroying his control over property.

Local zoning history usefully illustrates the collision of forces derivative from the sometimes conflicting, but accepted principles mentioned above, and illuminates the paradoxes. Danger imminent in any situation, if made explicit, perhaps may be rectified or avoided.

The growth pattern of Denver was established basically long prior to the legal concept of zoning. The city is located at the confluence of the Cherry Creek and Platte River, on an alluvial plain extending easterly and southerly, deposited by those streams and their predecessors between highlands which are prehistoric river banks. Early development centered on streets roughly paralleling the River, principally on Larimer Street, and basically in a southerly-northerly direction.

Historically population movement was south and east. The establishment of the Capitol Building on the east highlands, and palatial housing developments in the surrounding areas during the gold and silver booms of the '80's, caused a turning of business development at a 90° angle, and its movement toward the east-centered residence areas, particularly along Fifteenth, Sixteenth, and Seventeenth Streets, and at right angles to the former business centers, up to Broadway, a north-south thoroughfare faced by the new Capitol Building.

Early Denver became dependent on a central transportation system, based on rails, focusing traffic from residential areas into a business center extending approximately from Broadway on its east to the old business sections near the river. Development continued from the north-south artery, Broadway, and its intersection with the east-west artery, Colfax Avenue, at which focus stands the Capitol.

Until the mid-Twenties of this century, no Denver zoning controls existed, and few building restrictions of any kind were in effect. In May, 1923, Denver enacted Section 219A of its Charter, a zoning-enabling act, almost verbatim to that recommended by the Department of Commerce, which act became in almost identical language a state statute, permitting zoning by towns and cities in addition to the City and County of Denver.[21]

Ordinance 14, Series of 1925, was a zoning ordinance, adhering to a plan which recognized then existing patterns, including the

[21] Colo. Rev. Stat. §60-1 *et seq.* (1953).

limited central business district, several classes of business and commercial districts almost identical as to uses by right and only slightly more restricted in building dimensions and bulk than the central area, and extending along principal thoroughfares, certain industrial districts, and the familiar complex of single family, double-family, and multiple-family dwelling areas.

The basic validity of that ordinance was early considered in *Colby v. Board of Adjustment*,[22] which held that zoning ordinances act not only negatively but affirmatively for the public welfare, and basically upheld the concept of zoning, warning specifically, however, that general validation of the principle did not mean the court would hesitate to invalidate, on constitutional grounds, particular applications of zoning as adopted.

Much earlier, the Colorado court had laid down basic tenets as to the right to use land, from which it had seldom departed, even when sanctioning zoning regulation. More importantly, the court had held firmly within *judicial control* all exercise of these restrictive powers. In *City and County of Denver v. Rogers*, involving prohibition by Denver, as a nuisance, of any brick yard inside the City and within 1200 feet of any residence, school, or park, the court proclaimed reasonableness the key to regulation, a concept always to be determined by *judicial* standards: "The general grant of authority to the city not being, as we have shown, sufficiently specific and definite to warrant such broad and unrestricted legislation as is contained in this ordinance, its reasonableness, as well as the question of its constitutionality, become proper matters for consideration."[23] The ordinance was voided as "manifestly radical, unjust and oppressive" and as tending to destroy property without due process.

When the Denver City Council, prior to formal zoning ordinances, refused to permit a home for Negro aged and orphans, our court, in *City and County of Denver v. United Negroes Protective Association*, held that such Councils "are not beyond the control of the courts when, as here, by the findings of the trial court, they have grossly abused that discretion or acted arbitrarily."[24]

Though the City had hailed *Colby v. Board*[25] as a charter granting the municipality limitless power to restrict, it became apparent in *Hedgcock v. People*, that such boundless discretion was not intended. The action involved desired business use of property abutting on a street zoned as residential, which growth of the City had made arterial and business in nature. Residential use of the property restricted the land to $350.00 value, while business use permitted realization of some $3,500.00. The court held that a zoning declaration, contrary to the actuality of principal use, was void: "The clear inference from their testimony is that prior to the adoption of the zoning ordinance the block referred to was a business center and was continued so, and that it ought never to have been zoned otherwise."[26] Accordingly, rezoning was a denial of use of the property, unconstitutional and invalid legislation, "because

22 81 Colo. 344, 255 Pac. 443 (1927).
23 46 Colo. 479, 104 Pac. 1042, 25 LRA (NS) 247 (1909).
24 76 Colo. 86, 230 Pac. 598 (1924).
25 *Supra* note 22.
26 98 Colo. 522, 57 P.2d 891 (1936).

the zoning in question was unreasonable and therefore unconstitutional in that it unnecessarily and arbitrarily limited the use of a certain parcel of property for a purpose that was not justified under the admitted and determined facts and circumstances."[27]

Arbitrary regulation in defiance of existing economic facts, is prohibited, as is the continuation of restrictions under circumstances in which economic change has made the restrictions inapplicable. *People ex rel. Friedman v. Weber,* involving the introduction of business on Colorado Boulevard, an arterial street once residential, and wholly changed in character by developing use, states: "It is scarcely disputed that Tract A is practically valueless for residential purposes but of very considerable value for commercial use and this conclusion is inescapable from the admitted facts regardless of expert testimony. . . . Our conclusion is that the zoning of Tract A is contrary to the Charter amendment, confiscatory, and void."[28]

Moreover, restrictions must be interpreted in such manner as to allow projected use, rather than prohibit it. In *People ex rel. Grommon v. Hedgcock,* a building permit was refused a bungalow court in a business district upon the claim that a special section of the then zoning ordinance required special permission for construction of "automobile tourist camps." That phenomenon was not defined in the ordinance, and the court declined permission to limit use of the land:

> Until the legislative agency defines and prohibits such camps, there is, in our opinion, no legal basis—the alleged basis being too doubtful—under which one may be deprived of a legitimate use of property without violating constitutional guarantees in that respect. The police power, which is the legal basis for zoning legislation, must constantly be reconciled with the legitimate use of private property, in harmony with such guaranties.[29]

Despite such declarations, Denver continued to assert, in essence, that the right to use land derived from legislative authority, refusing to recognize that restriction upon use is abnormal, requiring demonstration of right and necessity. That theory was succinctly and unequivocally rejected in *Jones v. Board of Adjustment:*[30]

> We consider briefly some basic fundamentals. The right to the use and enjoyment of property for lawful purposes is the very essence of the incentive to property ownership The right to thus use property is a property right fully protected by the due process clause of the Federal and State constitutions The use to which an owner may put his property is subject to a proper exercise of the police power. The so-called police power is the authority under which zoning ordinances have been universally upheld. In every ordered society the state must act as umpire to the extent of preventing one man from so using his property as to prevent others from making a corresponding full and free use

27 *Id.* at 528.
28 110 Colo. 161, 132 P.2d 183 (1942).
29 106 Colo. 300, 104 P.2d 607 (1940).
30 119 Colo. 420, 204 P.2d 560 (1949).

> of their property. Thus, under the police power, zoning ordinances are upheld imposing limitations upon the use of land, provided, however, that the regulations are reasonable and provided, further, that their restrictions in fact have substantial relation to the public health, safety, or general welfare.[31]

The basic problem involved definitions, specifically the word "office." It was held that interpretation of the ordinance required a meaning favorable to the unrestricted use of property.

It is judicially recognized that as economic growth takes place within a community, restrictions once utile and significant become

31 *Id.* at 427.

inapplicable, and change of use, as from residential to commercial, must be permitted. *Bohn v. Board of Adjustment of Denver* recognizes that "It is a fundamental principle recognized by all the authorities that any regulation or restriction upon that use of property which bears no relation to public safety, health, morals or general welfare, cannot be sustained as a proper exercise of the police power of the municipality."[32] Zoning must change as the character of a neighborhood changes, since status too much prolonged can lead to decay:

> Now that West Colfax Avenue has become a cross-country artery and, as determined by the Board, is lined with business and commercial uses, the character of this territory, where Relator desires to build, has changed with the passage of time, the action of the Board, and the tacit assent of adjacent property owners. What at one time may have been considered residential property now has been devoted to business and commercial uses. It is very apparent from this record that the action of the Board in the instant case was arbitrary and capricious and will not stand the test set forth in *Hedgcock v. People ex rel. . . .*[33]

At the end of World War II, the Denver area greatly increased in population and general economic activity. Pent-up demand caused development of vast housing areas outside the bound of previous urbanization. In parallel with most metropolitan centers, there occurred a shift from a centralized city, dependent on mass transport to a central business district, to widely dispersed living, under semi-suburban conditions, made possible by diffuse automotive transport.

In Megalopolis, the "core city" must diminish in relative economic importance. In Denver that happened. Historic population movement south and east was accelerated over the plains by reason of building convenience and ease of utilities installation. Population moved so rapidly and so far south and east that the epi-center of the metropolitan area no longer occurred in the "Down Town" central business district centering at Colfax and Broadway, but lay three miles east and two and one-half miles south, near the intersection of Colorado Boulevard with Cherry Creek.

Highways were now the important links, not railway lines. However, though the "Down Town" area was no longer central in economic fact, it remained so in politico-economic influence. The concept of a centralized business district, based on heavy foot traffic and moved by street railway into the central area, was no longer valid. Strong impetus existed for the development for commercial purposes of the "shopping center," the dispersed commercial area, varying in size from the purely local store cluster centering in a housing development to the "regional shopping center" aggregating scores of stores and serving vast population segments.

Intense economic rivalry developed between interests primarily centered upon outlying and rapidly developing regions, and those centered in the established, but relatively static central area. Com-

32 129 Colo. 539, 271 P.2d 1051 (1954).
33 *Id.* at 544.

mercial and industrial activities followed retail trade toward decentralization, as new techniques made necessary vastly increased single-floor areas for warehousing of goods, rendering obsolete entire sections of warehouse facilities downtown; as manufacturing occupied new and enormous sites on the periphery of the city; and as subsidiary processing followed major facilities to the city's edge.

By Ordinance 16, Series of 1955, the City embarked on dangerous zoning expedients. Developed for thirty-one years on the 1925 pattern, recognizing the structural economics of the city as of its adoption, Denver had followed some uniform pattern of growth. The 1955 ordinance essayed a kind of zoning revolution, arbitrarily and radically reducing the amount of land available for non-residential purposes, placing capricious restrictions upon lands permitted business and commercial use outside the central business district, and imposing ruthless restrictions upon the size and bulk of buildings outside the central area. Regulation was attempted in the sole interest of the Central Business District, attempting to render competing activities subservient by providing for vast land requirements for "off street parking," sometimes equivalent to four time utilizable area, but not required at all in the Central Business District.

Peripheral business districts were recognized as to use, but specifically declared to be servient areas, tributary to the Central District, restricted as to parking requirements, building bulk, and the like in order to render competition with the Central Business District impotent.

Most immediately the impact of the ordinance was felt by the Broadway area, adjacent to the Central Business District, an area severely affected by the newly established differentiation and by provisions purporting to declare improper many traditional and established uses in the area, seeking to root them out by a system of proclaimed non-conformity and required registration of use. The result was the first of the so-called *Denver Buick* cases, instituted as No. B-8071 in the Denver District Court, in which, upon procedural due process grounds, the 1955 ordinance was wholly voided. The supreme court affirmed that voidance.[34]

Dramatically paralleling the court actions to void the ordinance, the Denver Council engaged in passage, under different notice forms and more careful adherence to charter procedures, the identical ordinance the court was voiding. As the court sat upon the 1955 ordinance there was introduced Councilman's Bill 403, Series of 1956, enacted on November 5, 1956, as Ordinance 392, Series of 1956.

Immediate court action followed in the Denver District Court[35] assailing the re-passed ordinance on varied procedural and substantive grounds. The ordinance was invalidated upon the finding that it ignored substantially all economic reality and was violently discriminatory.

Seldom has legislation been so clearly motivated by the desire of an entrenched economic interest and its supporters to thwart

34 136 Colo. 482, 319 P.2d 490 (1957).
35 Denver Buick, Inc. v. City and County of Denver, Dist. Ct. Denver County, Civil Action No. B13644.

economic competition by preventing land uses by others. It is indeed a curious phenomenon of modern economics, in land use and otherwise, that the course of those most violently opposed to private rights in property and the course of the most vociferous advocates of laissez-faire run directly parallel. The land monopolist buttresses his depredations with cries of "economic freedom," while those who advocate unrestricted public control tend to support that course, since aggregation in limited hands, monopoly and oligopoly, make eventually easier the task of monopoly in the state or total confiscation of that property. The more limitedly property is held in control, the more readily that control will pass from private hands into the state. Modern zoning, thus subject to abuse, leads unquestionably to the monopoly state, and if protracted must lead to total public control of the megalopolitan land resource.

Curiously, no one appeared, as shown by council and court records, to support the zoning measure in council. Substantial objections were made, but the measure unanimously passed, even though the courts were voiding its earlier version, and despite the monitions available in extensive precedent litigation.

After a trial of weeks' duration, the District Court rendered an extensive written opinion. It discussed attempted differentiation between the Central Business District and the peripheral, Broadway-centered, business district, referred to in the ordinance as the B-6 District: "[T]his so-called description of the Business 6 District so far as it relates to the district itself and the purpose it serves is totally in error and without foundation of fact."[36] The court pointed out that "both business districts contain businesses and buildings devoted to the same use of right and business as the other."[37] The ordinance, motivated by desire to protect economic interests in the Central Business District, attempted to render the peripheral district subservient, declaring "this district, *at present,* is a large area located immediately adjacent to the B-5 District [Central Business District] *for which it acts as a service area, . . .*"[38] Of this assertion, the trial court said: "This is totally without any foundation in fact."[39]

The court held that differential parking requirements made imperative devotion of private property to public service and purpose without compensation, in all districts except the favored Central Business District. Those requirements were therefore stricken in totality, the court finding that the regulation "divides the requirements into a maze of rules and laws which, in reality, make the owners of the real property therein the pawns and victims of the Department of Zoning Administration, with oppressive requirements, as the court will point out."[40]

This ordinance, designed to advance private interests, was condemned in language perhaps as strong as any ever judicially used in Colorado:

> The ordinance as to the description and motive for the zoning and off-street parking regulations is the most un-

36 *Id.* at 17.
37 *Id.* at 18.
38 *Id.* at 19.
39 *Ibid.*
40 *Id.* at 20.

> realistic document ever enacted by a law-making body, as relates to the B-5 and B-6 Districts. And thereby a segment of the business property in the City and County of Denver is strangled with a phony description of the district which could never have been written nor authorized by a person living in Denver, let alone by any member of the City Council who can or might look out of the Council Chamber windows.[41]

Attempted discrimination was total: strangulation by misdefinition; attempted imposition of subservient status; differential parking treatment of areas directly and prospectively competitive; and finally an attempt to require registration of land use, ultimately to exclude as non-conforming thousands of individual uses, retroactively to the date of the voided Ordinance 16, Series of 1955. Those attempts at regimentation and retroactivity the court also voided, it being held that "the power to prohibit lawful enterprise, and the use of one's property was never the intent of the people in adopting the zoning amendment to the Charter, nor will it permit uncontrolled regulations and dictatorial powers of commercial and industrial enterprise, such as set forth . . ."[42] in the registration and non-conforming use sections of the enactment.

The supreme court affirmed that opinion, and extensively quoted from it in the second *Denver Buick* case.[43] District differentials were entirely put down; off-street parking provisions were wholly voided; and the court found that under applicable Charter provisions, the Council could not require landowners who had theretofore used property for permitted purposes to register the same as non-conforming, to submit reports thereon, to encumber their titles, or to run the risk of loss of right to the use of their properties. Extension of uses, change in rental patterns, and repair, extension, and alteration of structure could not be prohibited. The court later adhered to its opinion in *Denver v. Redding-Miller, Inc.*[44]

The *Denver Buick* cases illustrate two of the most violent of the paradoxes of modern zoning. First, zoning is susceptible of terrible politico-economic destortion, the result of conscious effort, as specifically held in the cases, to favor one segment of the community over another and to vest in that favored segment the power potent

41 *Id.* at 24.
42 *Id.* at 33.
43 City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959).
44 141 Colo. 269, 347 P.2d 954 (1959).

in monopolies, control over business-commercial land uses in Megalopolis. Second, the cases demonstrate the danger of legislation, fostered by bureaucracy in the city, the little state, which "divides the requirements into a maze of rules and laws which, in reality, make the owner of real property therein the pawns and victims of" the administrative bodies involved. These abuses never end, but have found protraction even in privately and bureaucratically inspired attempts directly to legislate against judicially determined fact.

It is constitutionally clear in Colorado that no one holds or uses his property at the sufferance of his neighbor and that legislation tending to restrict use of property solely for the advantage of a neighbor or competitor is void.

These principles were early set forth in *Curran v. Denver,* voiding an ordinance which made use of one person's property dependent upon consent of his neighbor, because "it commits, in some instances, the exercise of the municipality's legislative discretion to property owners and residents, and in others, entrusts such power to the caprice of certain of its officers, and vests in them an absolute or despotic power to grant, refuse or revoke the right to carry on an ordinary, legitimate business."[45]

The *Curran* case was followed by *Willison v. Cooke,* in which it was held that:

> [I]t is a fundamental law, that a municipality under our system of government may, by ordinance, require the owner of a lot to so use it that the public health and safety will be best conserved, and to this end its police power may be exercised; but it is also fundamental, that such owner has the right to erect such buildings covering such portions thereof as he chooses, and put his property, as thus improved, to any legitimate use which suits his pleasure, provided that in so doing he does not imperil or threaten harm to others.[46]

In that same *Willison* case it is further said:

> Legislative restrictions upon the use of property can only be imposed upon the assumption that they are necessary for the health, comfort or general welfare of the public; and any law abridging rights to use of property which does not infringe the right of others, or which limits the use of property beyond what is necessary to provide for the welfare and general security of the public cannot be included in the police power of a municipal government.[47]

Fortunately, rights of property owners are not fundamentally subject to the legislative body, but are specifically a matter *for the courts:*

> Police regulations, in order to be valid, must tend to accomplish a legitimate public purpose; that is, such regulations must have a substantial relation to the public objects which government may legally accomplish; and while it is for the legislative department of a municipality to deter-

45 47 Colo. 221, 107 Pac. 261 (1910).
46 54 Colo. 320, 326, 130 Pac. 828 (1913).
47 *Id.* at 326-27.

> mine the occasion for the exercise of its police power, it is clearly within the jurisdiction of the courts to determine the reasonableness of that exercise, when, as in the case at bar, it assumes that power by virtue of its incidental or a general grant of authority.[48]

Accordingly, the consent of adjacent property owners to the construction of a store building was unnecessary:

> These regulations do not, in the slightest degree, have any relation whatever to the health, safety, or general welfare of the public, nor do they tend, in any sense, to accomplish anything for the benefit of the public in this respect, but merely attempt to limit the petitioner in a use of his property, which does not infringe upon the rights of others. This deprives him of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses, although, by so doing, he does not imperil or threaten injury to others of which they can lawfully complain. [49]

The *Curran* and *Willison* cases, old though they are, and antecedent to zoning though they may be, find specific approval of the court in the recent *Denver Buick* decisions.

That court, moreover, has made crystal clear its disapproval of the attempts of economic competitors to limit by zoning the uses of land. *Westwood Meat Markets, Inc. v. McLucas*,[50] involving an injunction by a competing market sought against zoning allowing construction of shopping center facilities, stated that zoning can be justfied only as a proper exercise of the police power, and that owners and lessees of commercial property distant from the subject property and of the same type as zoning authorized upon the subject, were not, as competitors, "aggrieved persons" entitled to attack or question zoning. Nothing, indeed, is more pernicious than the notion that a competitor may frustrate, by frustrating zoning, the development of economic competition.

Modern zoning is pregnant with and implicitly contains monopoly. So-called governmental "planning" accepts as a basic hypothesis that commercial and business land must exist in large, dense aggregates, and in limited locations. That planning accepts as an article of faith the concentrated "shopping center," the "industrial park," and the particular concentration of all retail, commercial, and business activity within ever narrower bounds. Such centers are, as land investments, in point of building capital required to institute and operate them, complex economic enterprises.

Small, local, and independent retail merchants cannot hope to possess their own land or building resources, for zoning limits available lands, and drives toward tenant status the local proprietor. The "center," however, rejects that tendency because, by reason of the vast sums necessarily invested in it, it is itself dependent for financing upon exterior means, institutional sources interested in "quality of tenancy," the certainty of rent collection. It is hypothe-

48 *Id.* at 327-28.
49 *Id.* at 328-29.
50 146 Colo. 435, 361 P.2d 776 (1961).

sized that any national operation, any substantial commercial chain, any potential or actual monopoly or oligopoly, is preferable in essence as a commercial risk to any individual or local merchant. Prime space in prime and scarce commercial land facilities, then, must be given to non-local operations, tending to the monopolization of commercial and economic activity generally in fewer and ever fewer hands.

Justice Story said the "monopoly" as understood in law, "is an exclusive right granted to a few of something which was before of common right."[51] It follows necessarily that "the granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty."[52]

"Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital,"[53] for the simple reason that, as observed by Justice Brandeis, "human nature is such that monopolies, however well intentioned, and however well regulated, inevitably become, in the course of time, oppressive, arbitrary, unprogressive, and inefficient,"[54] which is but another mode of phrasing Lord Acton's maxim that power corrupts, and absolute power corrupts absolutely.

Megalopolitan land is limited. Zoning limits still further the highly productive part thereof, commercial and business land. Economics of building finance restrict holdings of land and its use still further. Zoning is thus potentially capable of terrible abuse, and Denver has seen in the last six years that abuse in potent action. Zoning in this community has been made the prime instrument in advancement of selfish personal interests of a limited community segment. Our courts have wisely thwarted that attempt. The attempt, however, will continue unabated.

It is one of the paradoxes of zoning, also, that the emotional overtones raised by the word in the public mind are such that the residential landowner, interested in limiting incursions against his own uses, forgets that all coins have a reverse, and that the restrictions for which he sometimes clamours may tend toward monopoly and the eventual strangulation and death of Megalopolis itself. The "Great City," the metropolitan area, can develop only if development is reasonably free. If trammelled unduly, then surely the community, like a body without circulation, will die. It is healthful, therefore, that recent Colorado decisions limit the direct right of a competitor to use zoning objections as a device to thwart and stifle competition.

There is, however, and courts recognize, a rightful area within which property owners may be heard to protest. This area involves primarily protection of developed private residential property against unwarranted commercial intrusion. *Westwood Markets*[55] specifically recognizes the right of residential property owners,

51 Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).
52 Slaughter House Cases, 83 U.S. (16 Wall) 36 (1872).
53 U.S. v. Trans-Missouri F. Association, 166 U.S. 290, 324 (1896).
54 Brandeis, *A Free Man's Life* 181 (1946).
55 *Supra* note 40.

which is explored at considerable length by the court in *Holly Development, Inc. v. Board of County Commissioners.*[56] The Colorado court has indicated that it will protect established residential districts against business incursion, commercial or other use, absent the strongest showing of changed circumstances, which is essentially as it should be.

Clark v. City of Boulder[57] points out that residential property owners may rely on existing zoning conditions, where there has been no material change in the character of the neighborhood requiring re-zoning in the public interest. Specifically, the court refused re-zoning of a service station site proximate to a residential area. In such limited circumstances, property so proximate to a residential zone, though more profitably usable for commercial than residential purposes, may not be accorded special treatment by re-zoning. In the circumstances of the case, the rule appears reasonable, but it does constitute a repudiation of the basic constitutional principle that change of condition such as to make property limitedly usable for the purpose originally zoned, and much more suitable for another purpose, may compel re-zoning as an alternative to confiscation.

Those who consider zoning a panacea for all ills look for radical departures in each new zoning case. Colorado does not tend toward radical departures in zoning. Zoning is a permitted area of legislation, the weaknesses, dangers and paradoxes implicit in which, our court has clearly recognized, comprehended, and delineated. As in other areas of law, zoning decisions are made upon the circumstances of a case. Trends and tendencies in this state remain clear, and the court has been chary of approval of radical zoning changes if the fact of excess has been made clear.

Clark v. Boulder demonstrates that the allowance of commercial zoning in an area theretofore residential is based on the furtherance of some comprehensive scheme or plan designed in accordance with the public policy bases which underlie zoning. If so predicated, the change is allowable, and if made simply to relieve a particular tract from restriction, it is not permissible. Forwarding of a rational design is favored, but aggrandizement of an individual plot, to the detriment of its surroundings, is improper. A rather similar rule is announced in *Frankel v. Denver.*[58]

56 140 Colo. 95, 342 P.2d 1032 (1959).
57 146 Colo. 526, 362 P.2d 160 (1961).
58 363 P.2d 1063 (Colo. 1961).

Baum v. Denver,[59] like the *Frankel* case, holds that disparity in values for one use as against another does not control in the determination of the validity of zoning ordinances. So stated, the principle may not be the ground for quarrel. The *Baum* case, however, on its facts appears well outside the current of Colorado authority, and in its fact setting probably represents a situation ideally illustrative of one of the paradoxes we here study.

That case involves the re-zoning of a substantial tract of land, fronting on Sheridan Boulevard, an arterial highway which is also the county lines separating Denver and Jefferson Counties. Denver attempted residential zoning on segments of land along the thoroughfare; Jefferson County zoning is primarily business and commercial, abutting across the street. Traffic is very high, the Boulevard being one of the half dozen most travelled streets in Megalopolis.

The automobile is a great maker of zoning and the prime former of land values in Megalopolis. Where automobiles travel, commercial uses follow. Commercial value inheres in land primarily because of the habit of persons to foregather there, or because of the number of persons, capable of entry, who pass the particular location. Exterior effects of the automobile and of much-travelled streets are such as limit use of property on those streets for residence purposes.

Such a main travelled street, given proper multi-directional approaches and debouchements, will become in time commercial or business in nature, once any business incursion is allowed. This is manifest in Denver. Though zoning restrictions were imposed to prevent it, East Colfax Avenue, West Colfax Avenue, and Colorado Boulevard have successively become entirely commercial thoroughfares, becoming so in a short period after entry of the first commercial uses, and transformed from areas once almost wholly residential in character. City planners deplore those developments. Finding catch-all phrases useful, they stigmatize the development as "strip zoning." They stigmatize, in essence, a development inevitable in the automotive age, the commercialization of the heavily-travelled area, the foregathering of business where the people are. The solution of the planner is "development in depth," that is, zoning of large tracts, at scattered intervals, for commercial purposes, while attempting to maintain the arterial frontages for residential or multi-family uses.

"Development in depth" is a necessary prelude to land monopoly, as discussed above, and the arterial frontage is inutile for housing in most cases.

If large tracts bound a highway, residential uses are possible. Otherwise, retention of arterial strips, bounding main-travelled roads, for single-family residence use is visionary. No one who can remove himself from the influence of really concentrated automotive traffic, will voluntarily remain in residence proximate to it, unless in tracts of such size as to permit effective depth screening. The almost universally posited suggestion of the planner that multiple dwellings replace the single-family unit foolishly ignores the fact that the same objections which make the area noxious to an in-

[59] 363 P.2d 688 (Colo. 1961).

dividual house-holder will be no more palatable to an apartment dweller, particularly because only seldom does development make possible siting on lots sufficiently deep to offset the traffic effect.

Resultantly, arterial streets open to business, usually by court action, and once opened become commercial in time. Colorado Boulevard admirably demonstrates the point. In a procedurally intricate litigation, called the *Davidson Chevrolet* cases,[60] the Boulevard was commercially opened, an inevitable result upon the failure of Denver to eliminate the heavy commercial concentrations permitted in the freely zoned Town of Glendale. Contrary to the desires of the planners, and certainly in violent opposition to the wishes of the central land monopolists, South Colorado Boulevard has developed, on a periphery, as the primarily growing commercial area of Denver, inevitable because it is the geographic center of Megalopolis, and one free from artificial zoning restraints.

Prolongation of severely restrictive zoning, indeed, may seriously imperil all zoning in an area. If deterioration of a residential area begins, residence in the area becomes undesirable. If the land is not freed immediately for higher use, and made salable at reasonable prices for that use, there is an open invitation sent forth to urban blight. Immediate recognition of the problem, and limited relaxation of zoning, as occurred in Denver on South Colorado Boulevard and in parts of the Cherry Creek area, make possible permanent retention of high-grade residence areas, screened and protected by walls of high-grade commercial use fronting arterial thoroughfares. Failure of timely relaxation, or total abdication of control, cause those blight conditions manifest in the north part of Colorado Boulevard, still rigidly controlled, and such blight spreads.

Urban blight is most effectively combatted by early zoning for uses sufficiently productive in nature to permit destruction of blightable improvements before the disease occurs or spreads. The principle is simple. It is almost never recognized, and even less often implemented—another zoning paradox.

Preservation of the residential community is the great strength and the principal justification of zoning. The residential community and the single residential proprietor, however, often essay more than may be permissibly accomplished in the name of zoning. Such excesses are not judicially allowed. *Nelson v. Farr*,[61] a Greeley case, is illustrative. Land was annexed to Greeley under a plat showing blanket residential restrictions on lots in the annexed area. The owner retained undeveloped tracts for business and commercial purposes. The retained tract, when subsequently annexed to Greeley, was zoned for commercial uses. A trial court, persuaded by the residents to enjoin zoning, attempted to impose on the lands the burdens of the restrictive covenants limiting previously annexed lands to residential use. The Colorado Supreme Court rejected the limitation and held that a restrictive covenant could not extend by judicial action to lands not covered by covenant or contract, that there was no right to impose such a covenant not referential to specific lands, by requiring zoning limitations parallel to the cove-

60 137 Colo. 575, 328 P.2d 377 (1958); 138 Colo. 171, 330 P.2d 1116 (1958).
61 143 Colo. 423, 354 P.2d 163 (1960).

nant. The case appears proper on its facts, recognizing upon annexation that the land annexed was as free for development as prior to annexation.

Annexation itself, however, presents severe zoning paradoxes. Zoning power inheres both in County Commissioners, who often exercise it county-wide, and have done so in Megalopolis, in the Tri-Counties surrounding Denver, and a like power is granted municipal authorities, who have exercised that power within their corporate limits. It is often sought to alter established County zoning, and to alter established County plans, by annexing land to a municipality. Practically no change of circumstances is accomplished by translation of municipal boundaries across a street, particularly in Megalopolis, where city lines often afford no real differentiation even in degree of urbanization, and annexation is most often only a pretext for zoning, political and developmental gerrymanders.

These attempts to break established zoning by the juggling of municipal boundaries are of common occurrence in Megalopolitan areas. Colorado has not yet appellately decided the cases involving such problems, though one such case has been much litigated and determined at *nisi prius*.[62] An attempt to alter county-imposed residential zoning, on property in a substantially developed residential area, to permit commercial zoning by the annexing City of Englewood, was, in that case, disallowed.

The Colorado court has been willing to protect established residential uses. It has not, however, been willing to allow militant use of zoning by residents against other uses. The City of Englewood by ordinance barred churches of all kinds from single and double family residence areas, except as an act of grace, through its Board of Adjustment. "[R]eligious and educational institutions," including churches and places of worship, were permitted as "conditional uses, provided the public interest is fully protected and . . . uses are approved by the board."[63]

Land in a residential district was given the Apostolic Christian Church by a parishioner for the purpose of construction of a church building. Plans were presented to the Board of Adjustment showing conformance to building regulations and demonstrating adequate parking. Numerous objections were filed by residents, protesting that occupancy of their homes would be disturbed by traffic engendered by the church, sound originating during services, and the like.

The Board of Adjustment refused permission to build and action was commenced to compel issuance of permits. The District Court voided the ordinance as contrary to due process requirements, holding that vestiture of discretion in the Board, without standards, was void, and ordered permits granted. The supreme court[64] unanimously affirmed the lower court, the majority doing so on the basis that a church might not upon constitutional principle be excluded from any zone district, existing as a use by right in any district. Blanket exclusion, the court ruled, did not further the health, safety, morals, or general welfare of the community. A zoning ordinance providing

62 Deuth v. City of Englewood, Dist. Ct. Arapahoe County, Civil Action No. 16736.
63 See note 64 *infra* at 375.
64 City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961).

such exclusion was invalid under due process provisions both of Article 2, Section 25, of the Colorado Constitution, and the fourteenth amendment to the Constitution of the United States.

In a specially concurring view, a minority of the court limited concurrence to impropriety of delegation of discretion, substantially without standards, and to the fact that abuse of discretion had occurred.

The majority rule is consonant with that generally adopted in the United States: "Churches and accessory uses are generally permitted in districts zoned for residential use. In districts where churches are permitted, a parish house, school, or convent used in connection therewith is allowed as an accessory or appurtenant thereto."[65] The author quotes *Basset on Zoning*, page 200, to like effect:

> Practically all zoning ordinances allow churches in *all* residence districts . . . . It would be unreasonable to force them into business districts where there is noise and where land values are high, or into dense residence districts (in cities which have established several kinds of such districts.) Some people claim that numerous churchgoers crowd the street, that their automobiles line the curbs, and that music and preaching disturb the neighbors. Communities that are too sensitive to welcome churches should protect themselves by private restrictions.

Substantially all states, except California, which adopts a most eccentric and unjustifiable rule,[66] follow the quoted doctrine.

Clearly, the attempted exclusions have nothing to do with public health, safety, and welfare in the zoning sense. Manifestly churches, schools, and similar institutions are essentials of residential communities in a civilization like ours. Such functions, modal to the life of the community, must occur where the community lives. Worship and education cannot be excluded from a residence district, no matter how sensitive.

The majority opinion in the *Apostolic Christian Church* case reiterates strongly the basic precepts of the ownership right to determine uses of property and emphasizes as well that zoning is based wholly on public health, safety, and welfare and the restric-

65 Rathkopf, *Zoning* 259 (1956).
66 Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Portersville, 90 Cal. App. 656, 203 P.2d 823 (1949).

tions necessary to the preservation thereof, but it is not based on aesthetic considerations.

The tendency is to develop around Megalopolis a closed community, using municipal authority to buttress its own limited opinions, and to exclude agencies of expression of opinion by others. Zoning has no such purpose. There is no basis for such exclusion of ideas upon the predicate of law. Communities so sensitive must look not to zoning but to private covenant.

Several such isolationist communities have sought to exclude not only churches, but even schools,[67] an essay apparently well outside the zoning powers, not only by reason of *Apostolic Christian Church,* but also under the doctrine announced in *Reber v. South Lakewood Sanitation Dist.*,[68] where the court held that the Sanitation District, in location of its facilities, was neither governed nor governable by a county zoning resolution. That decision indicates that governmental authority may not be amenable at all to zoning regulations in the location and construction of public facilities, a rule broadly adopted in many jurisdictions.

Balance appears manifest in these decisions. Pressure of residential groups may not overwhelm judicial judgment as to the propriety of zoning restrictions. "Judicial judgment" must underlie and be the predicate of all zoning. Here lies another paradox. Under all applicable zoning statutes, before zoning may be instituted or, after institution, before it may be varied or changed there must be public hearings. Decisions such as the *Holly Development* case,[69] earlier discussed, require a judicial standard of conduct by the legislative body, making its decisions in zoning matters reviewable by certiorari. From an early date the court has held that propriety of zoning restrictions presented essentially judicial questions, to be judicially reviewed. The courts, however, declare further that they must refrain from "zoning," and that the legislative determination, in areas definable as discretionary, must not be readily impeded.

Here a great weakness exists. Few who have observed zoning hearings before legislative bodies or planning commissions can but have noticed a fearful sameness in those hearings, a discussion either perfunctory or essentially emotional, in an atmosphere pressed and stressed and not conducive to the deriving of information from the hearing process. Legislative bodies by their very nature are not constructed to hear and determine cases. Hearings must be either idle gestures, or since witnesses cannot properly testify or be examined, become a catch-as-catch-can debate, upon a predicate of emotion—all useless as a determinant of land use problems.

The volume of such work makes its legislative handling impracticable. In Denver alone, 300-odd ordinances annually deal with zoning or map changes, which necessitates the requisite amount of time in council procedures.

The legislature thus usually attempts to exclude the peteitioner from the council by a cumbersome process of administrative regulation, as in Denver, coupled with an almost Elizabethan secrecy of administrative procedure, or by a too rapid processing of vital matters by council or commission, as in other parts of Megalopolis.

67 Town of Greenwood Village, Colorado, Ordinances.
68 362 P.2d 877 (Colo. 1961).
69 *Supra* note 45.

Necessary development clearly requires special tribunals to hear zoning questions, and an orderly procedure and genuine record, reviewable and required to be reviewed by a court of law. Zoning should certainly not be handled in a manner less formal than public utilities or those cases within cognizance of an Industrial Commission. Neither the bureaucratic approach nor the log-jammed legislative one is basically workable.

Multiplicity of agencies often clouds administration of zoning matters. By statute, zoning power is fundamentally vested in legislative bodies, councils in the municipalities, and County Commissioners in the counties, with compulsory reference to planning commissions for advisory opinions. Those planning commissions exist at the local municipal level, at the county level, at interregional levels, and, in certain aspects, at the state level. Each body deems dear its prerogative of hearing and consultation, and these often quadrupled procedures delay the whole process, to the economic detriment of the community.

For the most part appointive and non-salaried, these bodies, though often composed of persons devoted to performance of difficult duties, allow undesirable local politico-economic influences to be exerted upon private matters of business and property management. In their interactions and confluence, the multiple agencies probably tend to confuse and impede, another paradox of zoning in Megalopolis.

In conclusion, it may be posited that zoning is and will remain with us as a possible method of protection of the public interest, whatever that may be, in property use in the metropolitan area; that the mechanism of zoning is one which has implicit within it considerable utility as a limited protective device, and substantial possibility and likelihood of abuse, both at the hands of the land monopolist, and municipal bureaucrat, and the over-protective; that the mechanism must always be subject to rigid control in the courts, and that so controlled, it may perhaps serve as a braking mechanism against too precipitate a change in land use. It is unlikely, however, as a practical matter, that zoning legislation will ever primarily determine land use, direct it, or form a fundamental basis for it. The dynamics of a community, so long as that community remains economically free, dictate the uses to which land will inevitably gravitate, whatever expedient of zoning be employed.

Zoning otherwise employed than as a braking mechanism is probably misapplied, and, historically, is probably futile. Zoning, misapplied, as is obviously possible, and in this community actual, can be deadly to the growth of the community, whose courts must be ever vigilant against the dangers implicit in this mechanism.

Such abused zoning results in an atmosphere making possible such dread distortions as the forced seizure of private lands implicit in Urban Renewal, and the gravitation of basic economic power into public hands, totally unacceptable as deviant from the basic postulates of our constitutional scheme.

Like most attempted regulations, introductions of rigidity into a professedly free society, zoning and land controls in Megalopolis are in their essence paradoxical.

URBAN RENEWAL – A PARTNERSHIP OF PUBLIC AND PRIVATE INTERESTS FOR URBAN BETTERMENT

BY MAXINE KURTZ*

Classical real estate theory predicates the existence of cyclical development and redevelopment of a free market in urban land. When the demand is sufficient, the vacant land will be improved with the private construction of buildings. As time passes, the investment in the buildings will be realized, and the value of the property (including the buildings) will fall below the value of the land in a vacant state. Theoretically, income will similarly fall, and eventually, the costs (taxes, insurance, maintenance) will exceed the return, and the building will be demolished. The land will then be available for new private construction when the demand arises. In many instances, this theory works in practice.

There can be, however, major roadblocks to the practical operation of this theory. The demand may be overestimated, as happened in Miami and in Chicago, two spectacular past examples. Thus, land is platted, utilities and other improvements are installed, and a few scattered buildings are constructed. Then the speculative bubble bursts, and the land becomes paralyzed. Some of the sites are abandoned by the owners and revert to the public on tax foreclosures. Ownership of the remaining sites becomes scattered among hundreds of owners all over the world.

Another major roadblock may be improper zoning. Prior to and during World War II, Denver suffered from a shortage of land where apartment construction was permitted. This resulted in "boot-leg" basement apartments springing up all over the city, while normal construction of standard apartments was suppressed. Another example dating from about the same period was a sudden increase in the demand for offices and clinics in the vicinity of our major hospitals, caused by the changing technology of medical practice. This demand for land development was held down for a number of years by prohibitive zoning in the desired areas.

A third major impediment to normal recycling of the physical plant of a community is what might be termed "milking" of slum properties. This consists of the owners of such properties purchasing them for a minimum price, making no repairs on them, overcrowding the premises with tenants (many on public welfare), enjoying minimal real estate tax rates because the structures have been depreciated by the assessor, and collecting rents which make such investments among the most stable and profitable in the modern money market. As a result of this combination of factors, these properties are not being demolished as hypothesized in the real estate theory stated at the head of this article.

Social reformers have been calling attention to this problem since the turn of the century. Such names as Jacob Riis, Lincoln Steffans, and Jane Addams were prominent in this movement. In-

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terest has not abated, as witness the recent series of articles on slum housing in Denver appearing in the *Denver Post*,[1] and the analysis of the effect of the money market policies on the rehabilitation of marginal areas, appearing in the *Reporter* magazine a year ago.[2] Housing codes, zoning ordinances, building codes, and capital improvement budgets based on comprehensive plans were among the tools which were developed in response to the needs pointed out by the early reformers.[3]

Heralded by President Franklin Roosevelt's challenge to the country to aid the one-third of the nation which was ill-fed, ill-clothed and ill-housed,[4] the federal government entered the field of improvement of urban communities in the mid-1930's. In cooperation with varying combinations of private and local governmental groups, the federal government is now operating a veritable galaxy of programs under the Housing and Home Finance Agency, including FHA and other similar loan insurance programs,[5] housing repair loan insurance,[6] interest-free loans for planning of community facilities,[7] loans and grants-in-aid for urban renewal (consisting of urban redevelopment and urban rehabilitation),[8] grants-in-aid for acquisition of open space,[9] grants-in-aid for certain public planning programs,[10] and low-rental public housing loans.[11]

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1 Denver Post, issues of October 9, 1961, through October 14, 1961, inclusive.

2 Jacobs, *How Money Can Make or Break Our Cities*, 25 Reporter 6: 38-40 (Oct. 12, 1961).

3 A brief history of the regulatory ordinances is found in Kurtz, *The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas*, 36 DICTA 414, 417 (1959).

4 Roosevelt, Franklin Delano, *Second Inaugural Address*, 1937.

5 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709 *et seq.* (1958, and 1959-1960 Supp.). See U.S.C. citations for amendments through 1960, and 75 Stat. 149 (1961), 8 F.C.A. Supp. 195 (July, 1961) for amendments made in the Housing Act of 1961. See also 73 Stat. 667 (1959) as amended by 75 Stat. 149 (1961), 8 F.C.A. Supp. 179 (July, 1961), 12 U.S.C. § 1701q (1959-1960 Supp.) re housing for the elderly; 64 Stat. 54 (1950) as amended by 65 Stat. 648 (1951), 67 Stat. 123 (1953) 68 Stat. 595 (1954), 60 Stat. 635 (1955), 70 Stat. 1094 (1956), 71 Stat. 297 (1957), 73 Stat. 655, 664 (1959), and 75 Stat. 149 (1961), 8 F.C.A. Supp. 177 (July, 1961), 12 U.S.C. § 1715e (1958, and 1959-1960 Cumm. Supp.), re cooperative housing; 62 Stat. 1276 (1948), as amended by 64 Stat. 59 (1950) and 74 Stat. 664 (1959), 12 U.S.C. § 1747 (1958, and 1959-1960 Cumm. Supp.) re rental housing for moderate income families; and 64 Stat. 77 (1950), as amended, 12 U.S.C. § 1749 re housing by educational institutions (See U.S.C. reference for numerous amendment citations).

6 64 Stat. 48, as amended by 65 Stat. 173 (1951), 67 Stat. 121 (1953), 68 Stat. 591 (1954), 73 Stat. 664 (1959), 12 U.S.C. 1706c (1958, and 1959-1960 Cumm. Supp.).

7 55 Stat. 361 (1941), 42 U.S.C. § 1531 (1958) as amended by 75 Stat. 149, 8 F.C.A. Supp. 191 (July, 1961).

8 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1958), as amended by 75 Stat. 149 (1961), 8 F.C.A. Supp. 182 (July, 1961).

9 75 Stat. 149 (1961), 8 F.C.A. Supp. 202 (July, 1961).

10 68 Stat. 640 (1954), as amended by 70 Stat. 1102 (1956), 71 Stat. 305 (1957), 73 Stat. 678 (1959), 75 Stat. 149 (1961), 40 U.S.C. § 460 (1958, and 1959-1960 Cumm. Supp.), 8 F.C.A. Supp. 187 (July, 1961).

11 50 Stat. 888 (1937), as amended, 42 U.S.C. §§ 1401-1435 (1958 and 1959-1960 Cumm. Supp.). See U.S.C. citations for numerous amendments to almost every section.

The multiplicity of programs resulted from the eventual recognition of the fact that no one of these programs was a panacea for the cure of all urban ills, though each has its role. Hence, each program should be clearly understood and examined in the light of what it is, and what it is intended to accomplish. Misuse is both disillusioning and expensive.

Urban renewal is one of the newer programs. Basically, it involves two kinds of activities: (1) urban redevelopment, and (2) urban rehabilitation.

"Urban redevelopment," as a technical term, has come to mean generally the elimination of substandard structures through acquisition (by purchase or by eminent domain) and clearance. It differs from public housing primarily in that the principal public purpose ceases when the land has been cleared.[12] Usually, the land is then sold to private enterprise for the construction of new buildings under such terms and conditions as will minimize the likelihood of the eventual recurrence of slums. Because of the great amount of capital required, most urban redevelopment projects have federal participation, but there are notable exceptions, especially in Chicago and Baltimore.

"Urban rehabilitation," as a technical term, refers to a program to restore and renovate marginal properties, although some spot clearance may also occur. Special long term repair loan insurance is made available to the landowners, but the loans must still be floated by private lending agencies under the "special assistance of FHA program." Both the private lenders and local FHA officials have shown marked reluctance to use this program, even with a guaranteed "take-out" (mortgage purchase) by the FNMA. In addition to financial aid, special technical staff services are provided by the local urban renewal authority to analyze deficiencies in structures, to recommend proper steps to remedy these deficiencies, and to assist the residents or owners in taking these steps (on a self-help or on a hired-help basis). Property acquisition is kept to a minimum.

These two programs are intended to be a kind of "partnership" between the public and the private interests in a community to achieve a better quality of urban development.[13] They are basically remedial in character and do not substitute for the regulatory measures designed to prevent slum formation on the one hand, or for the measures to rehouse the economically submarginal families on the other.

As observed recently by William Slayton, U.S. Commissioner of Urban Renewal,[14] the municipality's action is the keystone of the urban renewal effort. Colorado authorized such activities by

12 "The main object of this legislation is to eliminate slum and blighted areas as defined in the act . . . . The General Assembly has selected a method whereby the object shall be accomplished not by public ownership of the land but rather through private endeavor and ownership under the direction of authorized officials. The acquisition and transfer to private parties is a mere incident of the chief purpose of the act which is rehabilitation of the area." Rabinoff v. District Court, 360 P.2d 114, 118-119 (Colo., 1961).

13 Colo. Rev. Stat. § 69-4-1 (1953): "[T]his article is enacted to provide means whereby said areas may be redeveloped by private enterprise with such assistance from public funds as may be furnished in accordance with the provisions of this article"; 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1958): "The policy to be followed in attaining the national housing objective established shall be (1), private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need . . . ."

14 Reported in the Denver Post, Dec. 14, 1961.

its municipal corporations by the "Rehabilitation Act of 1945."[15] In essence, this statute requires that the municipal planning commission establish a plan for the redevelopment of any "substandard or unsanitary area" in the municipality. The city council or town board then adopts the plan, and establishes an authority to carry out the plan. This authority has the following nine special powers:

(1) To acquire the area by purchase, gift, condemnation or otherwise;

(2) To designate and set aside such part or parts of the area as may be necessary or desirable for public grounds;

(3) To vacate existing plats of part or all of the area, and to replat the same, and to establish streets, parks, and other public grounds;

(4) To remove any of the existing structures in the area so as to permit reconstruction, and to construct public improvements on the public grounds;

(5) To secure the necessary funds for the execution of the program, including borrowing money, receiving grants, and obtaining financial assistance by such other means or methods as may be provided in the development plan for the area;

(6) To issue revenue or general obligation bonds or debentures in payment of money borrowed. A mortgage may be given on the property in an area, except the public grounds, and the proceeds and rentals therefrom pledged to secure the debentures;

(7) To sell or give long term leases on all or any part of the property in the area, except the public grounds, to a "reconstruction agency" to erect improvements thereon in accordance with the development plan;

(8) To make such contracts as may be needed to execute the other powers of the authority;

(9) To initiate and prosecute proceedings for the assessment of part of the cost of the land in the area to other property specially benefited by the redevelopment of the area.[16] The power described in No. 7 above is also a duty.

The other powers of the authority are the usual grants of suing and defending in litigation and of exercising the power of eminent domain (including the power of superior eminent domain).

Home rule cities may use this statute if they so desire,[17] but it is not essential.[18] The need for the authority as a structural form to accomplish this program can be questioned. The creation of such a body is not conducive to the maximum coordination of the program with general city operations, and the potential exists for a program which is irrelevant or antagonistic to the other programs and objectives of the municipal government.

The prevalent opinion among the federal officials seems to favor authorities because the centralization of the activity in this way reduces the number of different policy-level officials who are working on the local program at various phases. This author's experience has been that any attempt by a home rule city to use its

15 Colo. Rev. Stat., ch. 69, art. 4 (1953).
16 Colo. Rev. Stat. § 69-4-7 (1953).
17 Rabinoff v. District Court, *supra* note 12, at 122 (Colo., 1961).
18 Mimeo material prepared by the Denver city attorney's office which accompanied Denver's initial application for urban redevelopment loan and grant funds during 1949-1950.

powers to devise a different local organization is strongly resisted by the federal officials, and delays of many months occur before any agreement is reached. The possible greater local efficiency which might result from using the freedom of a home rule city in managing its own affairs is thus negated by interminable arguments with the federal officials (the financial incentive of federal aid being too great to "go it alone").

Since the Housing and Home Finance Agency will advance loans for the planning and execution of an urban renewal program, and will give grants-in-aid for either two-thirds[19] or three-fourths[20] of the net cost of an urban renewal project (the gross cost of the project less the proceeds from the sale of the cleared land), most communities orient their urban renewal (synonymous with the state term "rehabilitation") programs around the federal standards and requirements.

The attorney confronted with the task of securing federal urban renewal assistance can rapidly secure a library on the subject by securing the pertinent statutes, regulations, handbooks and forms from his regional HHFA office.[21]

Urban renewal measures will not improve the quality of the urban community unless simultaneous steps are taken for preventing the same condition from recurring in other areas. In order to secure the maximum effectiveness from its aid, the federal government requires as a condition precedent to receiving aid that the municipality develop what is known as a "workable program for community improvement."[22] The objectives to be achieved by this program have been stated in one HHFA form to be:

> (1) To assure adequate standards of health, sanitation, and safety through a comprehensive system of codes and ordinances which state the minimum conditions under which dwellings may lawfully be occupied;
>
> (2) The formulation and official recognition of a comprehensive general plan for the community as a whole;
>
> (3) To determine what areas are blighted or in danger of becoming blighted and the identification of the nature, intensity, and causes of blight as a basis for the planning of neighborhoods of decent homes in a suitable living environment;
>
> (4) To identify and establish the administrative responsibility and capacity for carrying out overall Program for Community Improvement activities and for the enforcement of codes and ordinances;
>
> (5) The recognition of need by the community and the development of the means for meeting the costs of carrying out an effective program for the elimination and prevention of slums and blight;
>
> (6) A community program to relocate families displaced by governmental action in decent, safe, and sanitary housing

19 71 Stat. 299 (1954), 42 U.S.C. § 1453 (1958).
20 75 Stat. 149 (1961), 8 F.C.A. Supp. 182 (July, 1961).
21 Colorado is located in Region V. The office of the Regional Administrator is located at 300 West Vickery Boulevard, Fort Worth 4, Texas.
22 63 Stat. 414 (1949), as amended by 68 Stat. 623 (1954), 69 Stat. 638 (1955), 70 Stat. 1103 (1956), 73 Stat. 659, 670, 677 (1959), 42 U.S.C. § 1451c (1958, and 1959-1960 Supp.). See also Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 Law and Contemporary Problems 685 (1960).

within their means. Governmental action includes code enforcement, slum clearance, and the construction of highways and other public works;

(7) Community-wide participation on the part of individuals and representative citizens' organizations which will help to provide, both in the community generally and in selected areas, the understanding and support necessary to insure success.[23]

The purpose of this last requirement is to assure to the maximum, feasible extent the coordinated utilization of all local tools for the improvement of urban quality in order to have an effective attack on the problem of urban slums. In practice the results have been uneven, as financing problems, relocation problems, problems of land resale, and occasionally adverse community reaction have affected the program. The program has also been somewhat hampered by the lack of coordination among the great variety of federal programs dealing with urban quality, as described at the beginning of this discussion.

The urban renewal project itself must have reasonable prospects for maintaining sound quality. Numerous unfortunate experiences with public housing project locations largely dispelled the naive idea that a small island of sound construction in the midst of a sea of blight could maintain its high standards, or encourage adjacent private landowners to improve their properties. In order to achieve these objectives, an urban renewal project must have two characteristics: (1) standard quality of development must be attained throughout the project area, and (2) it must either be firmly anchored in existing standard areas or be of sufficiently large size to create its own self-contained environment. Reconstruction in accordance with a unified development plan is a major aid in attaining stability of good quality development,[24] and the acquisition of sound structures within the project area, by eminent domain if necessary, in order to assemble the land for a planned reconstruction is a proper exercise of local governmental powers in support of the general objective of developing a "better balanced, more attractive community."[25]

23 HHFA Form H-1082.
24 Required in Colo. Rev. Stat. § 69-4-4 (1953), and in 63 Stat. 414 (1949), as amended by 68 Stat. 624 (1954), 70 Stat. 1097, 1099 (1956), 42 U.S.C. § 1452d.
25 Berman v. Parker, 348 U.S. 26, 32 (1954).

The Colorado Constitution provides safeguards for the rights of one whose property is taken under an urban renewal project.[26] The U.S. Housing Act, in section 106(f) as amended,[27] provides additional assistance for the occupants of such property whether or not they are owners. This relocation assistance is outlined in some detail in the regulations issued by the Federal Urban Renewal Administration.[28] Basically, they provide (1) that the local agency must assist in relocating displaced families in standard housing, (2) that moving expenses can be paid both for residential and business occupants, and (3) that direct losses of personal property can be reimbursed. In addition, the Small Business Administration may aid in the relocation of eligible businesses.[29] Timing is of the essence for the preservation of some of these rights, and the attorney representing a client owning or occupying property which will be taken in an urban renewal project will do well to determine the current regulations *before* the client makes any overt acts toward relocation.

In urban rehabilitation projects, special mortgage insurance provisions are available to minimize the need for acquisition (so-called "Sec. 220 loans").[30] In urban redevelopment projects, "Sec. 221 loans" assist in the financing of housing earmarked for relocation of persons displaced in the course of the clearance process.[31] The only relationship between urban renewal projects and public housing projects is found in this phase, because in many renewal projects a sizeable minority of the families which must be relocated are eligible for admission to public housing projects.

Once the land has been cleared, it is prepared for resale to private enterprise. This involves the allocation of any land reserved for public use, possibly replatting of the land, and possibly installation of various public improvements. A development plan is prepared as a guide to the prospective purchaser indicating generally the type of proposed land use. Three types of bidding are commonly used, depending on the circumstances:

(1) Fixed purchase price, with the competition on the development plan;

(2) Open competitive bidding on price, based on the general land use plan proposed by the local urban renewal authority; or

(3) Negotiated sale under special circumstances (as for instance, when the land for sale is too small to be a separate building site and the only logical purchasers are the adjacent land owners).

The successful bidder is bound to the execution of his proposed development plan or of the general plan of the local urban renewal authority. The first land to be sold in Colorado under this program will be from the Avondale redevelopment project in Denver in 1962.

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26 Colo. Const., art. II, § 15.
27 70 Stat. 1100 (1956), as amended by 71 Stat. 300 (1957), 73 Stat. 673, 674, 676 (1959), 75 Stat. 149 (1961), 42 U.S.C. § 1456f (1958, and 1959-1960 Cumm. Supp.), 8 F.C.A. Supp. 170 (July, 1961).
28 26 F.R. 5712-15 (June 27, 1961), as amended by 26 F.R. 7826 (Aug. 23, 1961).
29 75 Stat. 149, 167 (1961), 8 F.C.A. Supp. 164, 168 (July, 1961).
30 68 Stat. 596 (1954), as amended by 69 Stat. 635 (1955), 70 Stat. 1094, 1102 (1956), 71 Stat. 8 (1957), 71 Stat. 295, 297 (1957), 72 Stat. 73 (1958), 73 Stat. 657, 664 (1959), 75 Stat. 149 (1961), 12 U.S.C. 1715k (1958, and 1959-1960 Supp.), 8 F.C.A. Supp. 185 (July, 1961).
31 68 Stat. 599 (1954), as amended by 69 Stat. 635 (1955), 70 Stat. 1094, 1102 (1956), 71 Stat. 297 (1957), 73 Stat. 658 (1959), 75 Stat. 149 (1961), 12 U.S.C. 1715L (1958, and 1959-1960 Cumm. Supp.), 8 F.C.A. 185 (July, 1961).

Urban renewal projects were an outgrowth of housing reform legislation. The early statutes required that almost all of the funds (90%) be devoted to predominantly residential projects. Gradually, a more sophisticated approach to urban quality has been developed, and the 1961 Housing Act authorized 30% of the federal funds for non-residential projects.[32] This affords new possibilities in such projects as downtown redevelopment, but it provides an equally great challenge for the development of techniques to renew such areas.

Urban renewal has been a constantly developing and changing program since its inception in 1949. Case law is minimal except on constitutional questions.[33] Much of the controlling law is contained in the regulations issued by the Urban Renewal Administration of the Housing and Home Finance Agency. It is imperative for an attorney having contact with an urban renewal project, whether as a city attorney, as counsel for the owner of land in a project, or as counsel for a prospective bidder on land in a project, to determine the *current* law on the subject.

Properly handled, urban renewal represents a promising partnership among the federal government, local units of government, and private enterprise, to restore and maintain the vitality of our urban communities while at the same time safeguarding the rights of private landowners involved in such projects.

32 75 Stat. 149, 168 (1961), 8 F.C.A. Supp. 186 (July, 1961).

33 Rabinoff v. District Court, 360 P.2d 114 (Colo., 1961); Berman v. Parker, 348 U.S. 26 (1954); see annotation at 44 A.L.R.2d 1414 (1955), 2 A.L.R.2d Supp. Serv. 2999 (1960), A.L.R.2d Supp. Serv. 561 (Jan, 1961), A.R.S.2d Supp. Serv. 247 (midyear, 1961), for an extensive collection of cases on the constitutional issues.

SUBDIVISION REGULATIONS AND COMPULSORY DEDICATIONS

By L. RICHARD FREESE, JR.*

I. INTRODUCTION

The growth of our American cities during the post-war years has been achieved, to a great extent, by subdivision development on the urban fringe. A typical subdivision is on an impressive scale, with a minimum of fifty lots and a marked increase in the appurtenances of urbanization. Incident to this growth there has been increased sensitivity by our public-minded citizens to the fact that planned and regulated urban expansion would not only promote the aesthetic pleasures of future city habitation but avoid the many difficulties created by sporadic, unregulated expansion of former years. Municipal control of urban development has moved beyond mere zoning regulations and is now promoting orderly growth by subtle, yet more penetrating, requirements imposed upon promoter-subdividers as conditions for official approval of their plats and the development and sale of their land.[1]

These newer post-war planning controls are denoted "compulsory dedications." Such dedications will be the focus of this article. For these purposes, compulsory dedications must be distinguished from zoning regulations. Typical zoning regulations determine whether the land is to be used for residential, industrial, or trade purposes, or control the size of the proposed lots or of the house footage, or establish the degree of set-back of a proposed structure from the street.[2] Compulsory dedications, by comparison, typically involve the following relinquishments of the subdivided land to public ownership:

a. Inner-subdivision streets: streets which primarily serve the subdivision's inhabitants as access-ways to the city's major arteries.[3]
b. Major municipal streets: streets which primarily serve the entire municipal populace, or at least a larger segment of the entire populace than the inhabitants of the subdivision itself.[4]
c. Rights-of-way for inner-subdivision utilities: easements for basic public utilities (water, sewer, electricity, telephone) needed for the new inhabitants.[5]

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* The author, an associate of the Denver firm of Lewis, Grant & Davis, is grateful for the advice and assistance of Clyde O. Martz, Esq., in the preparation of this article.

1 Most planning ordinances provide that a subdivision plat shall not be "recorded" until the conditions are met, thus implying that a subdivision may be completed regardless of such conditions if the developer is willing to forego recordation. However, the promotional advantages, indeed the necessities of recordation, make such inhibition an effective sanction. In many states, recordation is the only lawful way to set up a new subdivision. See Carter, J., in dissent in Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949).

2 E.g., Denver, Colo., Rev. Municipal Code §610-649 (1958).

3 See Ayres v. City Council of Los Angeles, *supra* note 1, where one of the dedications under attack was a requirement that the subdivider relinquish eighty, rather than the proposed sixty feet for a subdivision street which ran into a major city artery. See also Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (Ct. of App. 1952), where access roads to the proposed lots were required.

4 See Ayres v. City Council of Los Angeles, *supra* note 1, involving a dedication of twenty extra feet for future expansion of a major city thoroughfare. See also Krieger v. Planning Commission of Howard County, 224 Md. 320, 167 A.2d 885 (1961), where petitioner resisted a required dedication of fifty feet from the center of a "major street."

5 See footnote 6 *infra*.

d. Rights-of-way for future expansion of public utility systems: easements for utilities which will provide not only for the subdivision's inhabitants but for other neighboring subdivisions.[6]

e. Inner-subdivision public spaces: portions of the subdivision area deeded to the municipality for public recreational and educational facilities, designed primarily to provide for the needs of the new inhabitants.[7]

f. Community-wide public spaces: portions of the subdivision area deeded to the municipality for general municipal recreational and educational enjoyment, beyond the needs of the new inhabitants.[8]

g. Cash in lieu of public facilities: required payment of funds to a public fund in place of actual dedication of land to public ownership.[9]

Since *Village of Euclid v. Ambler*,[10] the first zoning case to reach the United States Supreme Court, the typical zoning regulations mentioned above have been considered acceptable modes of municipal control over private land use. Under the police power of each state, such zoning laws have been deemed consonant with the "public health, safety and general welfare."[11] Zoning is typically a restriction on *use*. It may well depreciate the value of one's property, but does not open up that property to public use. It is difficult, therefore, to envision the effect of such zoning regulations as an unconstitutional "taking" of private property without just compensation. Zoning laws have been deemed "unreasonable" only in the instances in which they actually negative all practical use or undermine all actual value of the zoned land.[12]

It is less difficult to envision a "taking" for public use in tracing the effects of compulsory dedications. In each of the six enumerated typical dedications above, the subdivider is actually required to deed his property to the corporate public body. Unlike the zoning laws, these compulsory dedications more directly highlight the conflict between the police power and the eminent domain provisions

6 In Kelber v. City of Upland, 155 Cal.2d 631, 318 P.2d 561 (1958), the subdivider was required to pay $99.07 per acre for a city "Subdivision Drainage Fund" as a condition for plat approval. In Lake Intervale Homes v. Township of Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958), the subdivider was compelled to install such water mains, sewers, etc. "as may be required by the governing body."

7 In Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961), an ordinance required the dedication of land in each new subdivision to "public grounds." In Rosen v. Village of Downers Grove, 19 Ill.2d 448, 167 N.E.2d 230 (1960), the city ordinance required the subdivider to dedicate land to "facilitate the establishment of school facilities convenient to any proposed subdivision . . . as may be deemed necessary by the Planning Commission . . . . " In Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), the statute provided for reservation for future appropriation of four and one-half acres of the subdivider's land, pursuant to a "general plan for parks." In Fortson Investment Co. v. Oklahoma City, 179 Okla. 473, 66 P.2d 96 (1937), the planning board required dedication of five per cent of each subdivision before approval of submitted plat was given. In Kelber v. City of Upland, *supra* note 6, $30 per lot was required to be contributed to a "Park and School Site Fund." See also *In re* Lake Secor Development Co., 141 Misc. 918, 252 N.Y.S. 809 (1931), and Coronado Development Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962).

8 See footnote 7 *supra*.

9 Kelber v. City of Upland, *supra* notes 6 and 7. In Coronado Development Co. v. City of McPherson, *supra* note 7, an ordinance provided that if ten per cent of a subdivision was not designated on the city master plan for park dedication, then subdivider must pay ten per cent of his land's value in lieu thereof.

10 Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 Sup.Ct. 114, 71 L.Ed. 303 (1926).

11 See, *e.g.*, Fischer v. Bedminister Tp., 11 N.J. 194, 93 A.2d 378 (1952) per Vanderbilt, J. See also Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 Wis. L. Rev. 370 (1961).

12 See *e.g.*, Denver v. Denver Buick, 141 Colo. 121, 347 P.2d 919 (1959); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954); Ritenour v. Dearborn Tp., 326 Mich. 242, 40 N.W.2d 137 (1949).

of our state and federal constitutions. Compulsory dedications, as the zoning laws, find their constitutional justification in the state police power.[13] Unfortunately, there has been considerable confusion in the courts over the divergent characteristics of compulsory dedications and of zoning laws and over their respective constitutional bases.[14] A semantical conflict has arisen over whether the police power concept should be used to "promote" the public needs, rather than simply "protect" it.[15] Some courts view the police power as an expansive tool, fit to justify non-compensable public action when the exigencies of the community overshadow private speculation. Other courts argue that the police power must not be allowed to become a doctrine of gargantuan statism, negativing any meaningful efficacy to the constitutional eminent domain provisions. In short, it is presently unclear at what point noncompensable compulsory dedications overflow into unconstitutional confiscations for public use. The state judicial temper, no doubt, has a great deal to do with the decisional result.[16]

A second constitutional problem is the due process concern over improper delegations of legislative power. This is a general administrative law problem. Its significance in this particular area is as yet unexplored.[17] Generally, there must be enabling statutes which provide for the planning regulations employed.[18] Such statutes must set forth sufficient guidelines so that planning commission approval of subdivision plats will not be subject to ad hoc, discriminatory conditions.[19] Although as a matter of practice, the planning authorities may be acting in a manner comporting with "fair play," the standards for administrative control are often so vague that subdividers may be subject to the arbitrary whims of planning authority personnel. This is less than due process. Moreover, it is not always clear that the scope of control is justified under an appropriate enabling statute.

In general, any subdivision control program must be sustained as a reasonable exercise of the police power and be circumscribed by clear guidelines in the enabling legislation.

13 See Ayres v. City Council of Los Angeles, *supra* note 1; Pioneer Trust and Savings Bank v. Village of Mount Prospect, *supra* note 7.
14 *E.g.*, Krieger v. Planning Commission of Howard County, *supra* note 4; Newton v. American Security Co., 201 Ark. 943, 148 S.W.2d 311 (1941).
15 See Frantz, J., concurring in Denver v. Denver Buick, *supra* note 12 at 143.
16 See Cutler, *supra* note 11.
17 See Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 Cornell L.Q. 258 (1955).
18 Denver v. Denver Buick, *supra* note 12 at 131-38.
19 Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953).

II. THE POLICE POWER AND EMINENT DOMAIN

Ayres v. City Council of Los Angeles,[20] was a landmark case involving the constitutionality of compulsory dedications. The city council imposed four conditions for plat approval upon the petitioner-subdivider: (1) dedication of a ten-foot strip for future widening of a major city thoroughfare running along the subdivision's boundary; (2) an additional dedication of ten feet adjoining the major thoroughfare for trees and shrubs to prevent access from the adjoining lots onto the busy highway; (3) dedication of the eighty-foot street rather than the proposed sixty-foot street, to run vertically into the major thoroughfare; and (4) dedication of an isolated triangle strip to street use. In a sweeping, latitudinarian opinion, the California Supreme Court upheld the "findings" of the trial court whereby these four requirements were "reasonably related to the protection of the public health, safety and general welfare."[21] In answer to the petitioner's contention that his property had been taken for public use without compensation, the court reasoned that the dedication was "voluntary, at least in theory."[22] The *Ayres* majority suggests that it is irrelevant that the benefits of the first requirement would primarily be received by the general public, not the subdivision's inhabitants, for in its view the police power justified the "promoting" of public goals.

The *Ayres* viewpoint has not been universally embraced. Indeed, the Illinois and Pennsylvania courts have taken a much more restrictive attitude. In *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[23] the Illinois Supreme Court reasoned that "the developer may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public," but "the subdivider should not be obliged to pay the total cost of remedying" the community's educational and recreational problems, for such "would amount to an exercise of the power of eminent domain without compensation."[24] In reconciling the conflict between eminent domain and the

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20 *Supra* note 1.

21 Ayres v. City Council of Los Angeles, *supra* note 1. *Accord*, Krieger v. Planning Commission of Howard County, *supra* note 4; Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (Ct. of App., 1952). See dicta in Caledonia v. Racine Limestone Co., 266 Wis. 475, 63 N.W.2d 697 at 699 (1954). See also, Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); Newton v. American Security Co., *supra* note 14.

22 Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1, 7 (1949). See also Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928). Compare the dissent in Ayres by Carter, J., which rejects this reasoning as pure sophistry. Carter, J., points out that in actuality, regardless of "in theory," the advantages of plat recordation are so great as to make the sanction of non-recordation an effective inhibition to resistance. *Cf.*, Mansfield and Swett v. Town of West Orange, 120 N.J.L. 145, 198 A.2d 225 (1938).

23 22 Ill.2d 375, 176 N.E.2d 799 (1961).

24 *Id.* at 801-02. See also the dicta in Rosen v. Village of Downers Grove, 167 N.E.2d 230 at 233-234 (Ill., 1960). *Accord*, Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). It is interesting to note that the California Court seems to have shifted its position in Kelber v. City of Upland, 155 Cal.2d 631, 318 P.2d 561 (1957), holding that "The purpose and intent of the Subdivision Map Act [the California enabling act] is to provide for the regulation and control of the design and improvement of a subdivision with a proper consideration of its relation to adjoining areas, and not to provide funds for the benefit of an entire city . . . . " In so holding, the California court skirted the constitutional issue faced in the *Ayres* case but by this statutory interpretation, the court has effectively narrowed the latitudian view of the *Ayres* majority. Of course, the *Kelber* holding does not constitutionally forbid the California legislature from passing an enabling act to provide for funds in lieu of actual dedications. Nevertheless, the majority's language indicates a more restrictive view of the constituttional issues would now be taken by the California Supreme Court. It is of interest that the three dissenters in *Kelber* were in the majority in *Ayres* while the *Kelber* majority was made up of new members of the California bench. In Fortson Investment Co. v. Oklahoma City, 179 Okla. 473, 66 P.2d 96 (1937), the Oklahoma court did not pass upon the issue of whether a required dedication of five per cent of every subdivision for public open spaces was a non-compensated taking for public use, holding that the trial court had correctly found that the dedication was "voluntary;" the implication of the court's language, however, is that a "compulsory" dedication would be forbidden. *In re* Lake Secor Development Co., 141 Misc. 918, 252 N.Y.S. 809 (1931) could be squared with these cases.

police power, these more conservative courts have enunciated the general proposition that the scope of the permissible compulsory dedication must be equitably related to the needs of the new community.[25] It is unreasonable to condition the use of private land upon a toll for the general community benefit. It is submitted that the Colorado Supreme Court would be receptive to this general proposition. In the recent *Denver Buick* case,[26] the court discussed the scope of the state police power in holding that a zoning ordinance requiring off-street parking upon petitioners' property was an unconstitutional confiscation for public ends:

> The legal effect of the argument of the City is that it has a problem of concentration of traffic in the street and that accordingly there is a right, under the zoning ordinance, to appropriate for off-street parking substantial portions of property of citizens desiring to use that property for a legitimate purpose . . . . No such power exists in the City thus to take private property for a public purpose without compensation to the owner for the taking.[27]

Not only does the *Denver Buick* language reflect a watchful solicitude for the efficacy of the eminent domain provisions, there is indeed little difference between this off-street parking zoning law and many compulsory dedication requirements, such as b, d, and f, enumerated above.

Assuming that the *Pioneer Trust* proposition would be adopted by the Colorado Supreme Court in judging the constitutionality of the compulsory dedications imposed by our various Colorado municipal planning bodies, the following decisional results would be reached with regard to the six typical dedications enumerated:

a. Inner-subdivision streets: being related primarily to the subdivision's needs, such dedications should not be envisioned as "takings" for public use, for the purport of the requirement is private.[28]

b. Major municipal streets: such dedications must be compensated unless the municipality can show that the new inhabitants will appreciably increase the artery's traffic, in which case the subdeveloper should donate an appropriate portion to compensate for the additional burden upon the public fisc.[29]

c. Inner-subdivision utilities' easements: these would be upheld under the same logic as in "a".[30]

d. Utility easements for future community expansion: unless the developer is compensated for a pro rata portion of such dedications designed to provide for other than his subdivi-

25 See especially Pioneer Trust and Savings Bank v. Village of Mount Prospect, *supra* note 23.
26 141 Colo. 121, 347 P.2d 919 (1959).
27 *Id.* at 131.
28 *E.g.*, Regulations of the Denver Planning Office, as adopted on September 26, 1956 [hereafter called "1956 Reg.'s"], Sec. V, C, (4) (dealing with alignment of subdivision streets with other existing streets), (9)-(10) (dealing with width of streets). Compare proposed Regulations of the Denver Planning Office [hereinafter called "1962 Reg.'s"], Section B, 2, (a). Regulations of Arvada Planning Commission (non-home rule city), as adopted on April 16, 1962 [hereinafter called "Arvada Reg.'s"], Section 5, C, (1), (2), (a), (b) and (d).
29 *E.g.*, "1956 Reg.'s" Sec. V, C, (1) (9) (10) (dealing with primary streets of one hundred feet width). Compare "1962 Reg.'s" Sec. B, 2, (c). "Arvada Reg.'s," Section 5, C, (2) (c).
30 *E.g.*, "1956 Reg.'s," Sec. V, C, (8), providing for easements for storm sewers, sanitary sewers and water mains to serve the new inhabitants. Compare "1962 Reg.'s," Sec. B, 2, (f). "Arvada Reg.'s," Section 5, E, (1) and (3).

sion's inhabitants, such would be an unconstitutional confiscation.[31]

e. Inner-subdivision public spaces: again, these would be upheld under the "a" logic.[32]

f. Community-wide public spaces: again, a formula reflecting the recreational needs of the new inhabitants and of the entire community must be achieved, the subdivider being compensated for that portion given primarily for use of the entire municipality.[33]

g. Cash in lieu of public facilities: if the payment required was equitably in substitute for the dedication not so required, and such payment were related to the subdivision's activities, it should be upheld. However, the courts seem reluctant to take this step. In *Kelber v. City of Upland* (California)[34] and *Coronado Development Co. v. City of McPherson* (Kansas),[35] the courts held that the enabling statute did not provide for cash in place of actual dedication. No cases, however, have squarely faced the constitutional issue.

III. THE DUE PROCESS DELEGATION PROBLEM

Dedication requirements must be authorized by appropriate enabling legislation.[36] Colo. Rev. Stat. §139-59-2 (1953) provides for the creation of city planning commissions. Colo. Rev. Stat. §139-59-6 (1953) empowers these planning commissions to make a master plan for their cities, locating streets, parks, public utilities, etc. This enabling act is sufficiently broad to authorize the compulsory dedications delineated above.[37] However, this act "applies to home rule charter cities [only] so far as constitutionally per-

31 *E.g.*, "1956 Reg.'s," Sec. V, C, (8), providing for easements for "the extension of main sewers and similar utilities." Compare "1962 Reg.'s," Sec. B, 2, (f). Note also "1956 Reg.'s," Sec. V, C, (6), requiring the dedication of easements along all streams "for drainage, parkway or recreational use." "Arvada Reg.'s," Section 5, E, (1), and Section 5, G.

32 *E.g.*, "1956 Reg.'s," Sec. V, B, requiring dedication for public open spaces "a reasonable size for neighborhood playground, park and public uses." "Arvada Reg.'s," Section 5, H.

33 *E.g.*, "1962 Reg.'s," Sec. B, 2, (e), providing that "Areas designated on the Comprehensive Plan as parks, playgrounds, schools or other public uses should be dedicated or an option to purchase given to the City for a period of 5 years."

34 155 Cal.2d 631, 318 P.2d 661 (1958).

35 189 Kan. 174, 368 P.2d 51 (1962).

36 Denver v. Denver Buick, *supra* note 12; Kelber v. City of Upland, *supra* note 24; Coronado Development Co. v. City of McPherson, *supra* note 35; Beach v. Zoning Commission of the Town of Milford, 141 Conn. 79, 103 A.2d 814, 817 (1954).

37 See, e.g., Arvada Ordinance No. 333, Nov. 25, 1957.

missible and so far as limits placed upon its application within the boundaries of home rule charter cities by the charter of each home rule charter city individually."[38] Article XX of the Colorado Constitution states that "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such [home rule] cities and towns, except in so far as superseded by the charters . . . or by ordinances passed pursuant to such charters."[39]

Section 651 of the Denver Ordinances provides for a "Subdivision Control Ordinance" whereby the Denver City Council must approve or disapprove of each subdivision plat before it can be recorded. The submitted plat is to be reviewed and approved by various city departments, such as the Department of Public Works, and a city Planning Office is authorized to set up regulations and rules for its recommendations to the city council regarding the propriety of the proposed subdivision. Basically, plat approval in Denver consists of action by the Denver City Council, under recommendations from its Planning Office and other city departments.

The enabling legislation for Denver's "Subdivision Control Ordinance," pursuant to Article XX of the Colorado Constitution, must be found in the Denver Charter. If the Charter does not authorize the ordinance, the state statutes must provide enablement. The Denver Charter does not specifically authorize plat approvals by the city council. However, Chapter B, Article I, Section B 1.12-1, of the Denver Charter, provides that "The council shall have power to enact and provide for the enforcement of all ordinances to protect life, health and property; . . . and to preserve and enforce good government, general welfare, order and security . . . ." Moreover, the "Zoning" provisions of the Denver Charter may provide sufficient authorization. Chapter B, Article I, Section B 1.13, grants the city council power "to regulate and restrict the height, number of stories and size of buildings . . . , the size of yards, courts and other open spaces . . . and the location and use of buildings, structures and land for trade, industry, residence and other purposes." This "zoning" provision, however, points to typical zoning regulations, not to compulsory dedications as such. Authorization might be sought in Chapter A, Article II, setting up the Department of Public Works. Section A 2.3-1 of that article provides that "no rights-of-way for streets . . . or other thoroughfares shall be established . . . and no site for any public purpose shall be accepted until first approved by ordinance." However, in its plat-by-plat approval of subdivision plats pursuant to the "Subdivision Control Ordinance," the city council is acting more as an administrative body than as a legislative body "by ordinance."

The inquiry as to whether a Denver ordinance has specific authorization under the Denver Charter is brought forth because of language found in the *Denver v. Denver Buick* case.[40] There, the Colorado Supreme Court held that the Denver Charter did not provide for certain zoning ordinances, thus, such ordinances could not be legally sustained. Therefore, the court viewed the Denver home rule Charter as a grant of power to the city council, rather

38 Colo. Rev. Stat. §139-59-1 (1953).
39 Colo. Const. art. XX, §6 (h).
40 141 Colo. 121, at 133-138 (1959).

than a limitation upon the council's hegemony over local and municipal affairs. Of course, to the extent that a home rule ordinance is not enabled by the home rule charter, the Colorado Constitution, Article XX, allows the state statutes to apply. There may be difficulty, however, in squaring such planning ordinances with either the city charter or the state statutes. Such is the case with the Denver "Subdivision Control Ordinance." If Denver's Ordinance does not find authorization under the Charter, it also does not set up a special planning commission with the powers and duties as set forth in Colo. Rev. Stat. §139-59 *et seq.* Pursuant to the Denver Ordinance, the City's Planning Office has only recommendatory powers.

An equally significant problem arises from the due process requirement that administrative bodies shall act pursuant to sufficiently discernible guidelines, set forth in the legislative enabling act.[41] The standards set forth in the Denver "Subdivision Control Ordinance" are both sweeping and vague. The ordinance provides that subdivisions should be "regulated and restricted in order to insure an orderly growth and development of the City and County of Denver.[42] The City Council shall impose "any reasonable conditions" to achieve that end.[43] In *Prouty v. Heron*, the Colorado Supreme Court held that: "Without standards fixed by the law [setting forth distinctions between various listing types of engineering, of which an applicant could be registered to practice only in the type for which he qualified], the discretion to declare what the law is, is delegated to the board [State Board of Engineer Examiners]. This cannot legally be done."[44] It is arguable that the Denver control ordinance does not meet this due process qualification. However, the *non*-home rule city enabling statutes, especially Colo. Rev. Stat. §139-59-14 (1953), are less susceptible to due process criticism. Not only are the policy goals set out more specifically in those sections than in the Denver control ordinance, no subdivision control can be undertaken until the commission adopts a comprehensive plan and sets up official regulations.[45] The Denver "Comprehensive Plan" was repealed as an ordinance, formerly Section 660 of the Denver Ordinances, in 1958.[46] The control ordinance does not bind the city council's approval of plats to any of the regulations set up by its own Planning Office, whose approval or disapproval of a submitted plat is purely recommendatory.[47] Thus, any unconstitutional vagueness of the Denver control ordinance would not be clarified under those cases which hold that a lack of sufficient guidelines is cured by the adoption of binding administrative regulations, either formally or by administrative practice.[48]

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41 Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953); Smith v. City of Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956); Caledonia v. Racine Limestone Co., 266 Wis. 475, 63 N.W.2d 97 (1954); Lake Intervale Homes v. Township of Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28, 38-40 (1958); Mansfield and Swett v. Town of West Orange, 120 N.J.L. 145, 198 A.2d 225 (1938).

42 Denver, Colo., Rev. Municipal Code §651.1 (1958).

43 *Id.* at §651.9.

44 127 Colo. 168 at 176. See Lake Intervale, *supra* note 40. Beach v. Zoning Commission of Town of Milford, 141 Conn. 79, 103 A.2d 814, 817 (1954); Borough of Oakland v. Roth, 28 N.J. Super. 321, 100 A.2d 698, 701-2 (1953).

45 Colo. Rev. Stat. §139-59-14 (1953).

46 Repealed by Sec. 2 (d), Ordinance 218, Series 1958.

47 Denver, Colo., Rev. Municipal Code §651.9-.10 (1958). See the introduction to *The Law and Rules* in the proposed 1962 Planning Office Regulations.

48 *E.g.*, Osious v. City of St. Clair Shores, 344 Mich. 693, 698, 75 N.W.2d 25, 27 (1956).

IV. CONCLUSION

Urban planning should be encouraged. Its benefits are many, both now and in the future. In achieving our public goals, we must take note of the paths which our constitutional framework requires us to take. As has been discussed, the law is not settled as to the rights and obligations of the public planning bodies in this area of subdivision dedications. This article has attempted to prognosticate the direction in which Colorado law will move with respect to this important matter.

URBAN RENEWAL OF BUSINESS PROPERTY – THE PREDOMINANTLY RESIDENTIAL REQUIREMENT

By HENRY STRAND*

The substance and character of legislation at a given point in history is often a revealing reflection of the times. Usually, as ideas and principles in legislation become outmoded, the legislation is eliminated, or remains unimplemented. In this process of legislative evolution, however, all too often there remain a substantial number of laws enacted in days gone by that stay vigorously alive although they have outlived their usefulness. They are, as it were, "legalistic impedimenta," or more popularly, "deadwood legislation." With the disappearance of the rationale under which they were initiated, they become an unnecessary obstacle to the orderly development of and compliance with the law.

Few pieces of legislation appear to be immune to this infirmity, if for no other reason than that there is seldom a complete meeting of the minds on the merits of a given measure. Congressional legislation on housing and urban renewal appears to be no exception, even though these programs since their inception have enjoyed substantial bi-partisan political support.

There has been, for example, continued criticism of a provision originally enacted in the Housing Act of 1949[2] which limited federal aid for urban redevelopment to project areas that are predominantly residential either prior to or after redevelopment.[3] This provision was evidence of a strong Congressional preference for renewal programs involving residential areas; renewal of industrial and commerical property was, from the beginning, not only of secondary importance, but of significance *only* as it related to housing.

Although modified in form, this requirement is still vigorously applied today, some thirteen years later. In considering current urban renewal legislation in order to determine the scope of obtainable federal aid, the city official will be confronted with this provision. He may understand its effect, but other aspects and questions concerning the provision may remain: Why was it enacted? How was it applied? What was its development? Is it necessary today? These are only a few of the questions that are posed and discussed, if not answered, in the following.

I. ORIGIN OF THE REQUIREMENT

It should be mentioned by way of introduction that the 1949 Housing Act, in which the predominantly residential requirement

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1 Johnstone, *The Federal Urban Renewal Program*, 25 U. Chi. L. Rev. 301, 313 (1958).

2 63 Stat. 413, 414 (1949), 42 U.S.C. §§1441 and 1450 et. seq. (1958), as amended, 42 U.S.C. §§1450 - 63 (Supp. II, 1959-60).

3 As originally enacted, Section 110(c) read as follows: (c) 'Project' may include (1) acquisition of (i) a slum area or a deteriorated or deteriorating area which is predominantly residential in character, or (ii) any other deteriorated or deteriorating area which is to be developed or redeveloped for predominantly residential uses, or (iii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise substantially impairs or arrests the sound growth of the community and which is to be developed for predominantly residential uses, or (iv) open land necessary for sound community growth which is to be developed for predominantly residential uses (in which event the project thereon, as provided in the proviso of section 103(a) hereof, shall not be eligible for any capital grant); 63 Stat. 420 (1949), as amended, 42 U.S.C. §1460(c) (Supp. II, 1959-60).

first appeared, forms the basis for existing Congressional legislation on urban renewal. The Act has been amended several times since 1949, most significantly in 1954,[4] but the basic legislation is still referred to as the Housing Act of 1949, as amended.

The rationale behind the predominantly residential requirement was formulated several years before enactment of the 1949 legislation. To a certain extent the proviso emerged with other fundamental features of the federal urban renewal program. It is interesting to note, however, that the so-called "Thomas bill," one of the earlier proposals espousing federal aid for urban redevelopment, did not contain a proviso discriminating between residential and non-residential property.[5]

The Thomas bill was one of several proposals containing urban renewal provisions that were considered by the important Subcommittee on Housing and Urban Redevelopment of the Senate Special Committee on Post-War Economic Policy and Planning.[6] This subcommittee, chaired by the influential Senator Robert A. Taft, established the theoretical framework for the predominantly residential requirement in extensive hearings held in 1944 and 1945 on matters relating to housing and urban redevelopment.

In hearings of the subcommittee, urban planners voiced the view that proposed legislation should be aimed at obtaining the highest and best use for a re-developed area, and should not be limited merely to fulfilling the post-war need for housing. Mr. Alfred Bettman, Chairman of the American Institute of Planners, stated the classic, oft-reiterated view of the planners:

> A serious warning needs to be issued against conceiving urban redevelopment as a subject identical with housing or housing with little variations — housing the theme, urban redevelopment the varaitions. Of the uses of the land of an urban area, habitation is the largest running, I believe, from 60 to 75 percent; but this is just as true of . . . the whole urban territory as of the blighted portion thereof. So, while housing construction will always form the larger proportion of all urban redevelopment . . . , a costly

4 68 Stat. 590, 622 (1954), 42 U.S.C. §§1451 et seq. (1958), as amended, 42 U.S.C. §§1451-63 (Supp. II, 1959-60).

5 S. 953, 78th Cong., 1st Sess. §18 (1943). "Project area is an area of such extent and location as is deemed appropriate as a unit of development project planning and for a development project separate from the developments of the other parts of the municipality of urban area . . . "

6 Hereafter referred to as the Taft Subcommittee.

> mistake will be made if urban redevelopment be conceived of as . . . replanning or rebuilding for housing only. *The . . . process needs to be applied to all areas which need it* and for all the classes of uses which, according to good city planning principles, are appropriate to those areas . . . [7]

Mr. Bettman illustrated his proposition by referring to a hypothetical situation involving decayed areas immediately surrounding railroad yards. Perhaps it would be better if these areas, only minimally residential, were redeveloped for non-residential or business uses. This would, of course, depend on the overall planning scheme. But if such a decision were made, Mr. Bettman thought, the limitation to residential redevelopment only would unduly restrict the redevelopment of the entire area, since the non-residential district was banned from federal aid.[8] Thus, the situation could well occur in which a decaying central business district, surrounded by residential areas in process of redevelopment, would continue to be neglected due to lack of federal funds. This then would raise the next question concerning the merits of surgery on the fringes of a cancer that is allowed to continue to exist.

Mr. Bettman's reasoning failed to impress Senator Taft, who appeared to be primarily concerned with the lack of federal funds for urban renewal activity. He was also reluctant to levy a heavier tax burden upon the voter and generally unwilling to impose federal programs and controls upon urban communities.[9] Senator Taft opined that if the city had no funds left for redeveloping non-residential property, it would be difficult to surmise that the hard-pressed federal government would have any either.

The virtually complete divergence of views concerning the merits of improving blighted business as well as residential areas became evident in an important exchange in which Mr. Bettman and Senator Taft were again discussing the hypothetical non-residential area around the city's railroad yards.[10]

> Senator Taft: For every structure that is destroyed around the railroad yard a new one has been built somewhere that is more valuable for that use. The tax revenue has steadily increased, except in a very recent period. Surely, I think the city ought to do something about it, but I do not see any economic disease affecting the United States of America in any respect.
>
> Mr. Bettman: If 25 percent of your urban territory is blighted, I do think that affects the national economy.
>
> Senator Taft: I do not see where it affects the national income in any way. As a whole, the city is still sound. The city has more people, more manufacturing establishments. It does not spend vast sums on these areas. Just as any man who bought real estate there and perhaps made a profit when it went up in value, and now it is going down in value and he loses, so the city loses in a particular area,

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7 Hearings before the Subcommittee on Housing and Urban Redevelopment of the Senate Special Committee on Post-War Economic Policy and Planning, 79th Cong., 1st Sess. pt. 9, at 1606 (1945). These hearings hereafter will be cited as Taft Subcommittee Hearings. (Emphasis added.)

8 *Id.* at 1607.

9 *Id.* at 1609.

10 *Id.* at 1614.

but it can more than make up for it in some other part of the city.

Mr. Bettman: What are you going to do with that area?

Senator Taft: I don't care what you do with that area. That is a local concern. I cannot see how it affects the national economy in any way.

Senator Ellender: Usually, you have a lot of poor people living in those blighted areas.

Senator Taft: I am willing to do something to the extent that the blight is a housing blight.

The concept of federal aid toward urban renewal of areas on a city wide basis appeared doomed until Senator Taft mentioned, significantly, that perhaps there was a *middle ground,* between redevelopment of housing only, which he favored, and redevelopment of whole cities, which he disapproved. He said that there was the possibility "that the Federal Government might finance the acquisition where, by doing so, they eliminate a comparatively large amount of slum housing, where *two-thirds of the place is residential . . .*"[11]

Thus, Senator Taft's conciliatory statement became the genesis of the predominantly residential requirement, by which it was at least theoretically possible for a city to gain federal aid for an industrial and commercial area, if at the same time it increased the size of the redevelopment area to include a sufficient number of blighted residential dwellings.

Needless to say, Mr. Bettman agreed to this somewhat strained approach,[12] since it represented a considerable softening of the relatively rigid atitude of Congress toward federal participation in any kind of redevelopment program involving business property. As we shall see, however, planners coming before Congressional committees on subsequent housing legislation were not disposed to consider Senator Taft's suggestion or the predominantly residential requirement as the final answer.

II. Evolution and Erosion of the Requirement

As a result of the Taft Subcommittee's recommendation, a predominantly residential requirement was incorporated into the Housing Act of 1949.[13] Implied in the term "predominantly," however, was the Congressional interpretation that this meant that the majority of the area must be residential, as opposed to Senator Taft's suggestion of two-thirds.

As indicated previously, the Housing Act of 1949 was primarily a housing bill, and only incidentally was it concerned with urban redevelopment. There was open recognition of the responsibility of the federal government to help in the effort to provide adequate housing for millions who had been deprived of this necessity of life due to World War II and the concomitant curtailment of dwelling construction.[14] Of course, adequate housing meant that the greatest effort would necessarily be devoted to rehabilitation of exist-

11 *Id.* at 1618. (Emphasis added.)

12 In speaking of the "middle ground" possibility, Mr. Bettman agreed that such a plan might be feasible since "all urban development is predominantly housing." *Ibid.*

13 63 Stat. 420 (1949).

14 S. Rep. No. 84, 81st Cong., 1st Sess. 10 (1949).

ing housing, as neither the community nor the federal government had the resources to put everyone in a new home. Therefore, the focus of activity on both the federal and local level would be upon the area of greatest need—substandard housing.

In carrying out this objective, however, the Congress injected the caveat that it did not feel "that the Federal Government should embark on a general program of aid to cities looking to their rebuilding in more attractive and economical patterns. But . . . there is a national interest in housing conditions . . . therefore, the Government should provide aid where the area in question is to be redeveloped primarily for residential use . . . ."[15]

Moreover, it was expressly stated that the scope of the legislation was based on the fundamental premise that the housing situation was primarily a local problem. The first responsibility rested with the local community, to determine what action was necessary to improve the housing situation. Then, although federal aid was conditioned upon the project meeting certain federal requirements, the local community would continue to bear the major burden of bringing the project into fruition.[16]

The expressed desire of Congress to prevent a federal program from infringing upon local and state sovereignty coincided with Senator Taft's personal views on the purpose of the housing legislation. It also helped form the basic rationale supporting the predominantly residential requirement.[17]

The House and Senate reports on the 1949 Housing Act were in accord supporting the predominantly residential requirement. In the House Report, the concern for federal non-involvement in local affairs was again mentioned, along with the now familiar palliative to the effect that localities need not be overly concerned about the requirement, since most blighted areas are predominantly residential, anyway, and if not, all the community has to do is include non-residential areas in with residential projects to obtain the requisite "predominance."[18]

The position of the federal agency primarily concerned with urban redevelopment, the Housing and Home Finance Agency, conformed with Congressional views on the requirement.[19] Raymond M. Foley, HHFA Administrator, stated that he believed the requirement was sound; that studies indicated that from sixty to eighty percent of all urban land uses, whether residential, commercial or industrial, involved housing. Therefore, Mr. Foley felt, the ma-

15 *Id.* at 13.

16 *Id.* at 2.

17 "At the same time this requirement will not interfere with the carrying out of effective local programs which will combine the clearance of slums with sound local plans for the development and redevelopment of communities. Most slums and blighted areas are predominantly residential in character and, in these cases, the bill would permit their redevelopment for whatever new uses are considered most appropriate by the locality. It is to be noted, of course, that here the test is whether the area is predominantly residential in character rather than in use. Where blighted commercial or industrial areas are isolated from residential slum areas and hence must be redeveloped separately, Federal financial assistance also would be authorized for their assembly and clearance where they are to be redeveloped for predominantly residential uses. This does not mean that cases of isolated blighted areas of business, industrial or commercial use, or open land, cannot be developed for an appropriate combination of uses under the provisions of the bill." *Id.* at 13.

18 "[T]his requirement will not interfere with but will rather assist the broad-scale redevelopment of our urban areas. Slums and blighted areas as they exist today are predominantly residential. It is also true that in residential slum-clearance projects, it will normally be necessary to include some adjacent non-residential blighted areas in order to assure the proper kind of redevelopment." H.R. Rep. No. 590, 81st Cong., 1st Sess. 17 (1949).

19 Hearings on H.R. 4009 Before the House Committee on Banking and Currency, 81st Cong., 1st Sess. 45 (1949).

jority of potential projects for clearance and redevelopment will be predominantly residential anyway. In an appearance before the Senate Subcommittee discussing the Housing Bill, Mr. Foley raised the economic rationale for the requirement, stating, "I do not feel that any substantial portion of this *initial* program should be diverted from our greatest need—the improvement of the immediate living environment of American citizens."[20]

Opposition to the solid front of the legislative and executive branches was indeed scanty in the period immediately following passage of the 1949 Act. Attention seemed to be focused on other more controversial aspects of the Act. [21] However, enough criticism has been generated in the years between 1949 and 1961 to spur Congress to modify the requirement, and to inaugurate exceptions to its scope of operation.

The first major change was enacted in the Housing Act of 1954.[22] The predominantly residential restriction was amended to the extent that the HHFA Administrator could devote up to ten percent of available federal urban renewal funds to non-residential projects.[23] There was, however, a serious limitation upon this provision. Only an area containing a "substantial number of slum,

20 Hearings on General Housing Legislation Before the Senate Subcommittee of the Committee on Banking and Currency, 81st Cong., 1st Sess. 92 (1949). (Emphasis supplied.)

21 E.g., toward the HHFA's interpretation of eligibility of a project involving "open land necessary for sound community growth . . . " Foard and Fefferman, *Federal Urban Renewal Legislation*, 25 Law & Contemp. Prob. 635, 668 (1960).

22 68 Stat. 590 (1954), 42 U.S.C. §§1441-83 (1958), as amended, 42 U.S.C. §§1450-63, 1471, and 1476 (Supp. II, 1959-60).

23 68 Stat. 626 (1954), 42 U.S.C. §1460 (1958), as amended, 42 U.S.C. §1460(b)-(e), (g), and (k), (Supp. II, 1959-60).

blighted, deteriorated, or deteriorating dwellings" could qualify for the ten percent exception, and only if the elimination of these dwellings "would tend to promote the public health, safety and welfare in the locality involved and such area is not appropriate for redevelopment for predominantly residential uses . . . ."

The Housing Act of 1959[24] increased the non-residential allocation provision from ten to twenty percent, and also removed the cumbersome limitation to areas having a substantial number of substandard dwellings. Then, in the Housing Act of 1961,[25] the non-residential allocation was raised to thirty percent.

Erosion of the requirement was further accomplished by the addition of a number of exceptions, which in the areas involved, entirely removed the effect of the predominantly residential requirement.

Thus, in 1956, under what is now Section III of the Housing Act,[26] Congress authorized the HHFA Administrator "to extend financial assistance under this title for an urban renewal project with respect to such disaster area without regard to . . . (6) the requirements in section 110 with respect to the predominantly residential character or predominantly residential re-use of urban renewal area . . . ."

Also, in 1959, an additional exception was accorded to areas involving colleges or universities; the Administrator was authorized to waive the requirement if "the undertaking of an urban renewal project in such area will further promote the public welfare and the proper development of the community . . . ."[27] This particular exception was broadened in 1961 to include hospitals "in or near an urban renewal project."[28]

The most significant, current provision made by Congress to expand federal urban renewal participation was added by Section 14 of the Area Redevelopment Act, approved May 1, 1961.[29] Under this exception, an area which is certified by the Secretary of Commerce as a redevelopment area will be eligible for financial assistance under the federal urban renewal program notwithstanding its designation for predominantly industrial or commercial uses. Furthermore, once a contract for federal financial assistance is signed, it will be continued to completion of the project, even though the area ceases to be a redevelopment area.

III. EFFICACY OF THE REQUIREMENT

Opposition and criticism to the predominantly residential requirement was neither concerted nor well developed. Not only was

24 73 Stat. 675 (1959), 42 U.S.C. §1460 (Supp. II, 1959-60).

25 75 Stat. 149, 168 (1961). The present text of the relevant article (110(c)) is as follows:"Financial assistance shall not be extended under this title with respect to any urban renewal area which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses: Provided, That, if the governing body of the local public agency determines that the redevelopment of such an area for predominantly non-residential uses is necessary for the proper development of the community, the Administrator may extend financial assistance under this title for such a project: *Provided further*, That the aggregate amount of capital grants contracted to be made pursuant to this title with respect to such projects after the date of the enactment of the Housing Act of 1959 shall not exceed 30 percentum of the aggregate amount of grants authorized by this title to be contracted for after such date."

26 Sec. 111 of the Housing Act of 1949, as amended, added by sec. 307(a) of the Housing Act of 1956, 70 Stat. 1091, 1101, (1956), 42 U.S.C. §1462 (1958).

27 Sec. 112 added by sec. 418 of the Housing Act of 1959, 73 Stat. 677, (1959), 42 U.S.C. §1463 (Supp. II, 1959-60).

28 Sec. 309 of the Housing Act of 1961 amended sec. 112. 75 Stat. 149, 169 (1961).

29 Sec. 113 added by Sec. 14, Area Redevelopment Act, 75 Stat. 47, 57 (1961).

opinion generally directed toward other, more controversial, aspects of the Act,[30] but the reasons for the provision in the economic atmosphere of post-war 1949 appeared fairly sound.

This is not to say that a state of complete euphoria prevailed. On the contrary, the city planners and developers, those individuals most closely involved with long range urban needs, were against it from the start.[31] The testimony of Mr. Louis Justement of the American Institute of Architects during Congressional hearings on the 1949 Act was indicative. Mr. Justement deplored the heavy emphasis upon housing and the resultant subordination of urban redevelopment:

> Housing is only one part of urban redevelopment and should not become the controlling factor. We believe that the administration of Federal aid for urban redevelopment should not be under the Housing and Home Finance Administration. A sound program for urban redevelopment must be based on effective city planning and industrial and commercial as well as residential land use.[32]

Mr. Justement also attacked the "piecemeal approach" of Congress toward urban redevelopment. Under the 1949 Act, the federal program was aimed at detection and removal of blighted portions of the city, the slums, without regard to the state of the surrounding areas, or concern for improvement of the city as a whole. The predominantly residential requirement was but another one of many aspects of the bill that would result in preventing urban redevelopment by misplacing emphasis upon blighted residential areas. "What is needed is urban redevelopment, the replanning and rebuilding of our cities on a more logical pattern . . . ." A first step in the right direction would be elimination of the predominantly residential proviso.[33]

The planners and developers were not alone in their opposition to initiation of the requirement. Spokesmen for business interests,[34] non-profit associations,[35] and citizens groups[36] were similarly in accord on the lack of merit of the provision. The crux of the criticism was the fear that the approach taken by Congress was an unreasoned singling out of one area of need, to the probable detriment of another equally deserving area.[37] Furthermore, the question was raised as to the need for an artifical federal restriction of this type where the community itself was the best able to judge whether and how certain land uses should be changed.[38]

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30 68 Stat. 590 (1954), 42 U.S.C. §§1441-83 (1958), as amended, 42 U.S.C. §§1450-63 (Supp. II, 1959-60).

31 Mr. Alfred E. Bettman's comments before the Taft Subcommittee, supra, are representative.

32 Hearings on General Housing Legislation Before the Sub-Committee of the Senate Committee on Banking and Currency, 81st Cong., 1st Sess. 700 (1949).

33 *Id.* at 704.

34 Statement of John F. Everitt, Long-Bell Lumber Co., Enid, Oklahoma: "If the Federal Government insists upon collecting the taxes and turning them back to the States for slum-clearance projects, then it should be done without a lot of strings attached." *Id.* at 634.

35 Statement of Elbert H. Burns, The American Legion: "[T]he title would be improved if it did not limit general land assembly to residential purposes and made possible the eradication of slums in our cities without regard to any connection with the housing program." *Id.* at 671.

36 Statement of Edward Weinfeld, National Public Housing Conference. *Id.* at 233.

37 Hearings on H.R. 4009 Before the House Committee on Banking and Currency, 81st Cong., 1st Sess. 124 (1949).

38 The customary result of redevelopment projects has been to replace slums with upper-income housing or commercial or industrial structures. Re-use of project areas for low-income housing has been limited, partially due to inapplicability of such areas for housing purposes. Johnstone, *The Federal Urban Renewal Program*, 25 U. Chi. L. Rev. 301, 321 (1958).

Disenchantment with the requirement appeared to increase in more recent years. Undoubtedly, this dissatisfaction has been the moving force behind the several legislative "accommodations" made by Congress which have tended to mute the severity of the provision. The 1958 hearings on new housing legislation revealed several direct recommendations to eliminate the requirement accompanied by sundry observations that the provision was obsolete, ineffectual and that it impeded progress.[39]

A savings and loan official declared:

> In the same way, I feel very strongly that the requirement that redevelopment must be primarily to erase substandard dwellings is ill advised. Decay in a city can lodge quite as much in its rundown business property as its housing. Usually, the replacement in a redeveloped area is business, not residential. To insist that only redevelopment which clears substandard dwellings shall be permitted is, I think, a mistake.[40]

The basic difference between the advocates of the predominantly residential requirement and those who favor its elimination appears to reside in the determination of what role the Federal Government should play in redeveloping cities. From the beginning of the federal program up until the present day, congressional intent may be clearly interpreted to favor an over-all housing approach, with urban renewal affixed as a necessary but subordinate adjunct. What were the reasons for this approach? As we have seen, there was a good deal of reluctance on the part of the legislators in 1949 to create a further substantial drain upon the already beleaguered federal budget. Viewing the economic situation in 1949, with the considerable defense commitments of that year, plus the funds still allocated for post-war rehabilitation programs, we must conclude that there was substance to this rationale. This, of

39 Hearings on Slum Clearance and Related Housing Problems Before the Subcommittee on Housing of the Senate Committee on Banking and Currency, 85th Cong., 2d Sess. 46, 47, 93, 128, 191 (1958).

40 Statement of Raymond P. Harold, President, Worcester Federal Savings and Loan Association, Worcester, Massachusetts. *Id.* at 169.

course, was the fundamental basis for instituting the predominantly residential requirement. If funds for urban redevelopment were limited, the requirement would be instrumental in channeling such funds to the area of greatest need, namely, blighted housing. While accepting the validity of this reasoning, the question must then be posed, is the economic rationale, forwarded some thirteen years ago during times of financial difficulties, still valid under present economically prosperous circumstances?

The second major rationale that is offered to support establishment of the requirement, namely, reluctance of the Federal Government to interfere in local affairs, is much less tenable. First, the federal program has always been a strictly voluntary one, with complete discretion in local communities to take advantage of the federal benefits or to "go it alone." The Federal Government has decided to "interfere" to the extent of offering these benefits to those communities complying with certain important requirements, among them the predominantly residential provision. In this light, it is inconceivable that any *more* autonomy could be extracted from local governments by *eliminating* a requirement than by demanding compliance with it. On the contrary, it is more likely that a large measure of interference is provided by the requirement in that it substitutes a degree of federal discretion for local by saying, in essence, that only a project that is "predominantly residential" is deserving of combined federal-local effort.

On the reverse side of the coin, it must be admitted that the predominantly residential requirement poses an ever-present real or potential limitation upon urban renewal. It is true that relaxation of the rigors of the requirement since 1954 raises the issue of whether the limitation now has any real significance. According to a 1955 analysis of fifty-three cities cited by Foard and Fefferman,[41] land use of developed areas constituted the following proportions:

Residential	About 73%
Commercial	About 6%
Industrial	About 21%

If these figures may be accepted as representative, then the present thirty percent exception for non-residential projects, along with the complete exemption of certain types of projects, should be sufficient to cover most projects involving solely industrial and commercial redevelopment. Furthermore, there always remains the questionable yet apparently sanctioned tactic available to proposers of urban renewal projects, simply to enlarge the essentially non-residential project area to include enough housing to meet the "predominantly" limitation.

If it may be concluded that the requirement has been emasculated, then a strong case can be made for its removal from otherwise effective legislation. On the other hand, if the provision still has any limiting effect at all, we must continue to ascertain and judge whether it is justified in present-day circumstances.

It has been stated that "a certain narrowness pervaded most of the discussion and consideration leading to enactment of the

41 Foard and Fefferman, *Federal Urban Renewal Legislation*, 25 Law & Contemp. Prob. 635, 671 (1960).

predominantly residential requirement,"[42] and that Congress has repeatedly avoided a realistic appraisal of long range urban needs. It seems evident that in its continued fostering of *housing* redevelopment as opposed to *urban* redevelopment, Congress has not recognized the fundamental nature of the urban living environment. In virtually all of its pronouncements, little attention has been given by Congress to the basic problem of *redeveloping the city as a whole*. In general, the tendency has been to view the urban blight problem as matter that could be handled in a limited geographical area, a city block, or neighborhood. Simply remove the "sore spot" and the problem must vanish.

Opposed to this view are those maintaining that the character, patterns and condition of industrial and commerical areas vitally influence residential areas, and efforts to renew such areas. Frequently, residential areas that are most in need of renewal are those that border industrial and commercial areas, for example, the "downtown commercial district," or the industrial "enclaves" and "fingers" along rails and waterways. Is it realistic to carry out redevelopment of these blighted residential areas while avoiding the neighboring, probably causative, industrial blight? What are the effects of selective or "piecemeal" renewal upon the city's presumably unified transportation and utility systems? Are all of these matters separable, so that development of one will not affect the other?

There is a strong current of opinion that all of these elements are interrelated, and that "the urban renewal process should be made sufficiently flexible to permit our cities to deal with commercial and industrial blight and to effectuate broad plans for rebuilding their cores."[43] For example, owners of deteriorating centrally located small business are being faced with increasing competition from more modern suburban facilities. Needless to say, not all of these businesses will be permitted to relocate. Those that stay are faced with gradual economic extinction if the city is financially unable to take steps to eliminate blight and make the surroundings more attractive. Among the larger centrally located industrial concerns, the tendency will be to move to a city where there is no blight problem, occasioning a probable economic loss to the abandoned city.

As has been shown, Congress has not stood absolutely still in adapting to changing needs of the urban community, which now comprises over seventy percent of the nation's population. The emphasis on housing still exists, but urban renewal programs have been changed and broadened almost annually. Throughout all of this progress, however, the predominantly residential requirement still remains, somewhat like the awkward prehistoric animal that has somehow learned to adapt to the modern environment. Although inroads have been made diminishing its effectiveness, it continues to be a force that must be considered today, if not respected. The question now remains, whether mere necessity to consider the requirement is sufficient justification for its continued existence.

42 *Id.* at 666.
43 Hearings on Slum Clearance, op. cit. supra at 22.

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